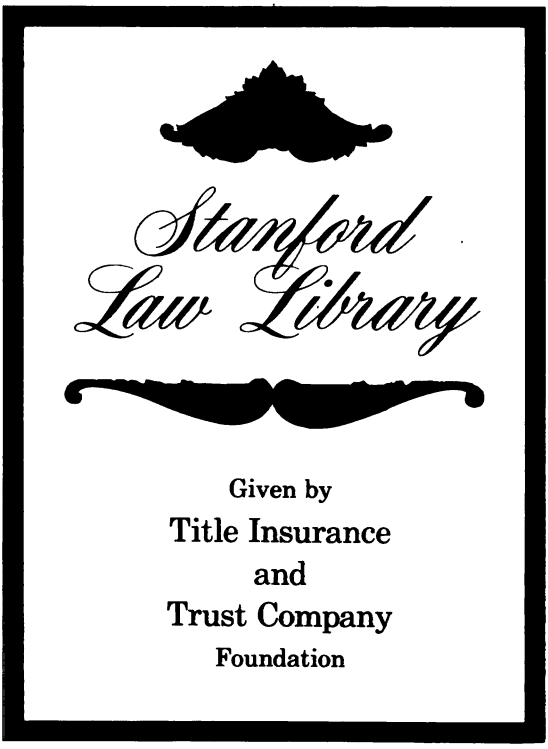
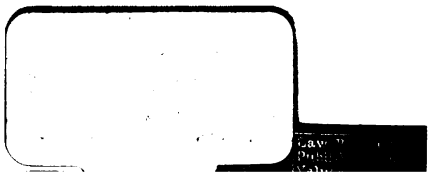

Stanford
Law Library
Given by
Title Insurance
and
Trust Company
Foundation



A

SUCCINCT VIEW

OF THE

Rule in Shelley's Caſe;

EXHIBITING,

By negative and affirmative Propoſitions, the Inſtances in which *ſeveral Limitations*, one to the *Anceſtor*, the other to the *Heirs*,—the *Heirs of the Body*,—or *Iſſue of the Body* of that Perſon, do and do not give the Inheritance to the Anceſtor.

By RICHARD PRESTON,

OF THE INNER TEMPLE,

Author of the *Elementary Treatiſe* on the *Quantity of Eſtates*.

Ineſt ſua Gratia parvis.

EXETER:

Printed for the AUTHOR, by TREWMAN and SON.

M,DCC,XCIV.

TO

THE HONORABLE

SIR FRANCIS BULLER, BARONET,

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT
OF KING'S BENCH AT WESTMINSTER;

A SEAT WHICH HE FILLS WITH DISTINGUISHED
HONOR TO HIMSELF, AND WITH THE GREATEST
ADVANTAGE TO THE COMMERCIAL
INTERESTS OF THIS KINGDOM;

THIS ESSAY

IS,

BY HIS PERMISSION,

AND

WITH A HIGH SENSE OF THE FAVOR CONFERRED
BY THAT PERMISSION,

HUMBLY AND RESPECTFULLY

INSCRIBED

BY

HIS VERY OBLIGED AND OBEDIENT

SERVANT

THE AUTHOR.

PREFACE.

THE Liberality, indeed the Generoſity, of the Profeſſion, diſplayed in their Reception of the Elementary Treatiſe, by Way of Eſſay, on the Quantity of Eſtates, and the favorable Opinion expreſſed of that Eſſay in the *Monthly*, *Critical*, and *Analytical* Reviews, and by ſeveral Gentlemen of diſtinguiſhed Abilities, have raiſed, in the Author of that Work, a Wiſh to make the ſame ſtill more acceptable to the Profeſſion; and he has now employed about ten Times as much Labor in reviſing, correcting, enlarging, and improving that Eſſay, as he imparted to prepare the ſame for its firſt Publication. In the Reviſion of that Work, he obſerved, that, in treating of the Doctrine on *Freeholds*, he has been ſilent on the Rule in *Shelley's* Caſe; and that in the

Chapter on *Eſtates in Fee*, he has noticed this Doctrine in very general Terms, without ſhewing its Application by Examples, or introducing the Inſtances which are allowed to be Exceptions to the Rule, framed from this Learning. The Truth is, that, at the Time he compiled the Eſſay on Eſtates, he did not find himſelf equal to the Taſk of introducing and obſerving on this Rule to his own Satisfaction; and it was not till a very recent Period that he made the Attempt; and he made it with great Doubt of his Abilities to exhibit the Scope and Extent of the Rule, in a Manner, that, even in his own Opinion, would make his Labors uſeful, as connected with, and embracing Part of, the Subject of his former Treatiſe, and elucidating ſome of the Points immediately relevant to the Learning diſcuſſed in that Treatiſe.

His Succeſs however, was beyond his Expectation, tho' by no Means equal to his Ideas of Perfection. He is aware that the

the Rule is ſtill capable of far greater Illuſtration. Of this he is fully perſuaded, from the Obſervations he has already made. In his own Hands, this Eſſay has been increaſing in Size, from Time to Time—At firſt, it was compriſed in a few Pages, even 3 or 4; and it has increaſed into its preſent Bulk by ſmall Degrees.

All that he aimed at, in the firſt Place, was to ſuit his Obſervations on this Rule to the other Parts of his Eſſay on Eſtates; into which, on a Republication of that Book, this Rule will be introduced.—In the mean Time the following Obſervations are offered to the Profeſſion, in their preſent detached Form, without any other Expectation, on the Part of the Author, than that they will afford ſome Proof, that the Succeſs of his former Publication has not rendered him indolent or inattentive.

A Partiality for the Profeſſion, and its Practice in the *Conveyancing Line*, will al-

ways excite his Induſtry; and, if in the Courſe of the Publication of the ſeveral Eſſays he has in Contemplation, and about which he is now engaged, he ſhall deſerve well, in any Degree, from thoſe, for whoſe Uſe his Works are deſigned, he will, in reflecting on the Pleaſure and Satisfaction naturally ariſing from the good Opinion of his Friends, and the Conſolation that he hath not been an uſeleſs Member of Society, wholly forget the Labor: and aſſure himſelf that Society cannot be more effectually ſerved, than by ſhewing the Means to be purſued, in Order to the Settlement, and, its Conſequence, the peaceable and ſecure Enjoyment of Property, free from Litigation; which ſo materially affects the Repoſe and Comfort of thoſe who are intereſted in the Event.

In Excuſe for the Errors into which he has fallen, he may ſtill plead his *Youth*;— and he is too ſenſible of his own Inability, to give a complete Treatiſe on the Subject of

of this Eſſay, not to avail himſelf of every Circumſtance that can intitle him to Indulgence.

Inner Temple, 1ſt May, 1794.

ON

TABLE OF CONTENTS.

Introduction.

I. Preliminary Obſervations to the Conſideration of the Rule.

Intention

IV. Subjects on which the Rule operates.

Difference

V. Origin and Hiſtory of the Rule.

VI. Circumſtances that muſt concur, in order to the Operation of the Rule.

On

FURTHER OBSERVATIONS ON THE FREEHOLD.

Conſideration

ON WORDS OF SUPERADDED LIMITATION.

General

Difference

A TABLE

OF THE

CITED OR INTRODUCED CASES,

Arranged in ALPHAHETICAL ORDER,

By the Names of the ſeveral Plaintiffs and Defendants.

Gillott

T

W

IN this Work there remain ſome typographical Errors. They are few in Number, and do not affect the Senſe. The Reader is requeſted to correct them, and alſo to ſupply an Omiſſion of the Author in ſtating the Caſe of Hayes and Ford (Page 59); in which the Deviſe, by the Will, was to the *Heirs Male* of N's *Sons*,—and not to N's *Sons*. The Inſertion of the Words "*the Heirs Male of*" immediately after the Word "to," and before the Word "his" in the 14th Line of that Page, will make the Statement correct, and ſhew the Grounds of the Concluſion drawn from this Caſe.

ON THE

Rule in Shelley's Caſe.

THE ſubject of this Eſſay is, profeſſedly, the Rule in *Shelley's* Caſe; (*a*) and the end propoſed, is, by negative and affirmative propoſitions, to exhibit, in a diſcuſſion of that Rule, the inſtances in which *ſeveral limitations*, one to the *anceſtor*, the other to the *heirs*,—heirs of the *body*,—or *iſſue* of the body of that perſon, do and do not give the *inheritance* to the anceſtor.

It is a Rule immediately relevant to the doctrine on eſtates of *freehold* and *inheritance*, and under particular circumſtances, involves in a material and very intereſting point of view, the law on the conſtruction of words of *limitation* in *deeds*, *wills*, and other writings, ſuch as *declarations*

(*a*) 1 Co. 93.

tions of uſes, appointments in purſuance of powers, &c. It may be expreſſed in theſe words,

When a perſon takes an eſtate of *freehold, legally* or *equitably* under a *deed, will,* or other *writing,* and, afterwards, in the *ſame* deed, will, or writing, there is a limitation, by way of *remainder,* with or without the interpoſition of any other eſtate, of an intereſt of the ſame *quality,* as *legal* or *equitable,* to his *heirs* generally, or his *heirs* of his body; by that name in deeds or writings of *conveyance,* and by that or ſome ſuch name in wills, and *as a claſs* or *denomination of perſons,* to take in *ſucceſſion* from *generation* to *generation;* the limitation to the heirs will intitle the perſon or anceſtor himſelf to the eſtate, or intereſt, imported by that limitation: or in other words (for ſo the Rule has ſometimes been propoſed) " wherever the anceſtor takes an " eſtate of freehold, or franktenement, and an " immediate remainder is thereon limited, in " the ſame conveyance, to his heirs, or heirs " in tail, ſuch remainder is immediately exe- " cuted in poſſeſſion, in the anceſtor ſo taking " the freehold, and therefore is not contingent

" or

" or in abeyance." (*b*)—Or, ſtill more accurately " where the anceſtor takes an eſtate of " freehold, by any gift or conveyance; and in " the ſame gift, or conveyance, there is a limi- " tation, either mediate or immediate, to his " heirs, or heirs of his body, the word heirs is " a word of limitation of the eſtate, and not of " purchaſe;" (*c*) by which it muſt be underſtood that it is not a deſignation of perſons, to take *originally* in their *own* right.

The Rule has alſo been expreſſed, perhaps with ſtill greater preciſion though not with equal elegance, by a very able lawyer to be " That in " any inſtrument, if a freehold be limited to " the anceſtor for life, and the *inheritance* to his " heirs, either *mediately* or *immediately*, the firſt " taker, takes the whole eſtate; if it be limited " to the heirs of his body he takes a fee-tail; if to his heirs a fee-ſimple." (*d*) In this propoſition the Rule aſſumes the fact to be, that the *inheritance* is limited to the *heirs*, and, therefore, it

(*b*) Fearne. (4 Editn.) 30. 2 Roll. Abr. 417. 1 Co. 104. *Shelley's* Ca. 1 Inſt. 22. b.

(*c*) Fearne 30. 103. 2 Roll Abr. 417. 1 Rep. 104. *Shelley's* Caſe. Brook *Done*, &c. pl. 11. Same Noſme pl. 1. 40.

(*d*) Per Serjt. *Glynn* in *Perrin* and *Blake*.

it expreſſes the legal application of the Rule, more clearly, than thoſe poſitions, in which it is ſtated, generally, that the ſecond limitation is to the heirs: for the very ground and principle of the Rule, is that the *heirs*, as ſuch, are, in point of *intention*, to have the *inheritance*, *quatenus* they are the *heirs* of the *anceſtor*. (*e*)

The ſame obſervation may be made on the firſt of theſe definitions; for the accuracy of which the writer of this Tract is anſwerable.—In that definition, keeping in view the opinion of Lord *Thurlow*, delivered in *Jones* and *Morgan*, (*f*) he has propoſed, that the limitation muſt be to the heirs, as a *claſs* or *denomination* of perſons, to take in *ſucceſſion*, from generation to generation; and this is, in terms, to ſay that the *inheritance* muſt paſs under the limitation to them.

So that the Rule analyſed, requires

Firſt—That there ſhall be an eſtate of *freehold*.

2*ndly*.—That there ſhall be a limitation to the *heirs*, or heirs of the body, of the perſon taking that eſtate; by that, or ſome ſuch ſubſtituted, Name.

(*e*) See *White* and *Collins* infra.
(*f*) 1 Browns Ch. Ca. 206.

3*dly*.—

3*dly*.—That theſe heirs ſhall be named, to take as a *claſs* or *denomination* of perſons.

4*thly*.—In ſucceſſion, from generation to generation.

5*thly*.—By way of *remainder*, and ſo that the eſtate, to ariſe from the limitation to the *heirs*, and the eſtate of freehold in the *anceſtor*, ſhall *both* owe their effect to the *ſame* deed, will, or writing.

And laſtly, that the *ſeveral* limitations ſhall give intereſts of the ſame *quality*: both *legal*, or both *equitable*.

Leaving it indifferent,

Firſt, Whether the limitation to the *heirs*, is to give an intereſt, to take place immediately after the determination of the anceſtor's eſtate of freehold, and conſequently connect itſelf with that eſtate, and, by *merger* thereof, form one entire intereſt; or to take place at a remote period; waiting *for*, and continuing expectant *on*, the *determination* of

of ſome *other* eſtate, limited in remainder of the anceſtor's eſtate.

2ndly. Whether the limitation to the *heirs* is to give a *veſted* or *contingent* intereſt.

At leaſt, if theſe are not inferences ariſing fairly out of the *definition* of the *Rule*, they will be found fully warranted by the *caſes* from which the Rule is to be collected; without any exception to the generality of theſe deductions, beſides the caſe propoſed by Mr. *Fearne* of an eſtate of freehold, with a power of appointment to uſes, in one deed, and an execution of that power by another deed, in favor of the heirs of the perſon to whom the freehold is limited by the *firſt* deed; *(g)* and thoſe caſes which will be noticed in the ſequel, as not within the extent of the Rule, or, for particular reaſons, exempted from its influence, by the interpoſition of a court of *equity*.

Theſe deductions, it muſt be obſerved, are concluſions from the following parts of this eſſay. They are introduced, in this place, to open the ſcope

(g) Fearne 99.

ſcope of the Rule at one view, and in an early part of this publication. The Author feels abundant reaſon to make this remark, to excuſe himſelf for having treated the ſubject, without a ſtrict regard to this arrangement.

For introducing ſo many definitions of this Rule, an apology may alſo be neceſſary. One motive to this conduct, was to ſhew the various means, uſed by different perſons, to convey their ſenſe of the ſcope and application of the Rule. Another motive originated in the hope, that the impreſſion to be made by the ſeveral definitions, would be more ſtrong, than that which would be communicated by either, ſingly. It was alſo thought that the compariſon which muſt be made of the ſeveral definitions, to obſerve the circumſtances under which they exhibit the Rule, would be the moſt certain way, at the ſame time, to inform the judgment, and aſſiſt the memory.

The extent and importance of this Rule, the variety of caſes which it embraces, the doubts entertained on its extent and application, and the nice diſtinctions, and numerous exceptions

of which it admits, render the conſideration thereof a taſk of great difficulty. An attempt, however, will be made, though with diffidence and doubt of ſucceſs, to exhibit the rule, in a point of view, ſufficient to awaken the attention of the reader; give him an outline of the doctrine; and intereſt his wiſhes, ſo far as to raiſe in him a deſire of extending his reſearches, into the elaborate and highly valuable Treatiſe of Mr. *Fearne*, on *contingent Remainders*; from whoſe judicious eſſay on that ſubject, the greater part of the doctrine on this Rule is collected. The perſuaſion that the *Eſſay on the Quantity of Eſtates*, already before the Public, and particularly the chapter on *Freeholds*, is defective, for want of the learning of this rule, is the beſt apology that can be made, for offering a ſeparate and diſtinct eſſay on the principles and outlines of which the rule itſelf is compoſed. However, ſome hope is formed, that the ſuccinct and collective view, and alſo the manner and arrangement, in which the rule is exhibited in this eſſay, will aſſiſt the ſtudent, in reading the more extended and laborious works of Mr. *Fearne*; and that this eſſay may have its utility, after that book is read, in calling the

the detailed and cogent reaſons of that gentleman to memory; ſerving as a ſynopſis to his work.

Moreover, it may have the effect, and a very deſireable one it will be, of preparing the reader to enter on the laborious works of Mr. *Fearne* with ſome previous inſight into the ſubject, and with that general knowledge of the application of the rule, and of the exceptions to the ſame, which will be a means of aſſiſting him to ſee the full force, the reaſon and the extent of that gentleman's concluſions, and of the caſes he has introduced, in elucidation or ſupport of his poſitions, or on which he has offered his ſentiments with ſo much energy and judgment.

The importance of a thorough knowledge of this rule will be evident, from the conſideration, that the power of *alienation* by the anceſtor, to a *total* or *partial* excluſion of his *relations*, coming under the denomination of his *heirs*, in the deſcriptive terms of the limitation which names them, is, very frequently, to be aſcertained through the medium, and by the application of this rule. In thoſe inſtances to which the rule

applies, the anceſtor has this power of alienation; for the inheritance is *in him*, and *his children* or other *relations*, ſo far as their right is founded upon the limitation to *his heirs*, can claim only in ſucceſſion from him, and, therefore, will be bound by his acts; while in thoſe inſtances to which the rule does not apply, the *children* or other *relations*, falling under the denomination of *heirs*, have a title *originally*, in their *own right*, and as *purchaſers* by that *name*, and do not claim through or under their anceſtor, further than as perſons deſcribed by means of his *name*, and as his heirs: in other words, as the perſons in whom this character is to be fulfilled, and therefore their anceſtor, merely becauſe he bears that relation to them, cannot, by his alienation, make any diſpoſition to their prejudice.

Before any obſervations are made on the immediate application of the rule, it will be right to premiſe, that the ſame is of poſitive inſtitution, and has this circumſtance of peculiarity and variance from rules of conſtruction in general, that, inſtead of ſeeking the *intention* of the parties, and aiming at its accompliſhment, it interferes in *ſome* at leaſt, if not in *all* caſes with the

the *preſumable*, and, in many inſtances, the *expreſs* intention. In its very object, it was levelled againſt the views of the parties. Hence, has ariſen the great difficulty, of deciding the queſtions which involve the conſideration of the rule. To determine whether the operative force of the rule, or other rules of conſtruction which take the *intention* of the parties for their guide, ſhall prevail, is, generally, the point to be decided. It is much and ſeriouſly to be lamented, that a line cannot be drawn ſo nicely, as to enable a diſtinction to be clearly taken, diſcriminating thoſe caſes that are, and thoſe caſes that are not, the objects of the rule.

Every caſe muſt in all *inſtruments*, and eſpecially in *Wills*, in a great meaſure, depend on its *particular* circumſtances. The queſtion in theſe caſes will always be, which of the two rules, the one in *Shelley's* Caſe, or the one that regards the intention, ſhall be applied to determine the legal effect of the *ſeveral* limitations, to the *anceſtor* and his *heirs*; and in the progreſs of the obſervations to be offered in this eſſay, it will be attempted to trace the rule in *Shelley's* caſe to its principle, and thereby ſhew its force and extent, in the

cleareſt point of view, that it can poſſibly be exhibited.

To begin with the outlines of the rule, it muſt be called to remembrance, that in *Perrin* and *Blake*, (*b*) Lord *Manſfield* ſaid, "The rule is not "a general propoſition, ſubject to no controul, "where the intention is on the other ſide, and "where the objections may be anſwered." And he agreed with Juſtices *Wilmot* and *Aſton*, that "The intention is to govern, and that *Shelley's* "Caſe does not conſtitute a deciſive uncontroul-"able rule."

And that great Lawyer to whom this Eſſay is inſcribed, in the well conſidered opinion he delivered on the caſe of *Hodgſon and Wife* v. *Ambroſe* (*i*), which involved the diſcuſſion of this Rule, to the obſervation that "If a teſtator "makes uſe of legal phraſes or technical words "only, the Court is bound to underſtand them "in their legal ſenſe, and that they have no "right or power to ſay, that the teſtator did not "underſtand the meaning of the words he has uſed,

(*b*) 4 Burr. 2579. 1 Collectanea Juridica.

(*i*) Doug. Rep. 327.

"uſed, or to put upon them a conſtruction, "different from what has been long received or "what is affixed to them by law,"—added the following diſtinction,—"But if a teſtator uſe "*other words*, which manifeſtly indicate what his "intention was, and ſhew, *to a demonſtration*, that "he did not mean what the *technical words im-* "*port*, in the ſenſe which the *law* has *impoſed* "upon them, that intention muſt prevail, not- "withſtanding he has uſed ſuch *technical words* "in other parts of the will." (*k*)—And that the "operation of words muſt ariſe from the ſenſe "they carry," was a remark of Lord *Hard-wicke's* (*l*); and "that ſenſe," Mr. Juſtice *Buller* has very judiciouſly obſerved, "can only be found "by conſidering the whole will together (*m*)." And in this place, it will be right to attend to a diſtinction, which will be a clue for ſolving all queſtions of ordinary difficulty, and the point of this diſtinction is that the rule extends to thoſe limitations only, in which the *heirs* of the perſon, to whom a previous eſtate of freehold is given, are, by the *manifeſt intention* of the par-

(*k*) Doug. Rep. 327.

(*l*) In *Bagſhew* and *Spenſer*, 2 Atk. 583.

(*m*) In *Hodgſon* and *Ambroſe*.

ties, to take *under that appellation*, and that appellation embraces *all* the heirs of the *given deſcription*, and the limitation has *theſe heirs* alone, and no others of a different claſs, nor the *heirs* of the *heirs* as *individuals* (thereby diſtinguiſhing between the heirs of the *anceſtor*, and the heirs of the *heirs*) for its *object*: and it extends to caſes of this deſcription, as often as theſe *heirs* are, immediately after the deceaſe of their anceſtor, to be entitled in the ſame manner, and to the ſame extent of intereſt, and to an eſtate exactly with the ſame deſcendible qualities, as they would take from their anceſtor, if the limitation was to *him* and his heirs &c, even though it is the *intention* of the parties, that theſe heirs ſhall take by *purchaſe*, and not by deſcent, and that the eſtate of the anceſtor ſhall never, in any event, be *enlarged* by the limitation to his heirs :—For as, in ſeveral ſentences, connected in ſenſe though detached in expreſſion, it was emphatically ſaid by Lord *Thurlow* (*n*), in declaring his ſenſe of the application of this rule, "Where the *heir* "takes in the *character* of *heir*, he muſt take in "*quality of heir.*"—"By all the caſes where the "eſtate is ſo given, that after the limitation to the

(*n*) *Jones* and *Morgan*, 1 Brown. Ch. Ca. 216.

" the firſt taker, it is to go to every perſon who " can claim as heirs to the firſt taker, the word " heirs is a word of *limitation.*"—And again, " All heirs taking as heirs, muſt take by *deſcent.*"

This is the principle, the leading object, and characteriſtic feature of the rule, which the reader will perceive is confined to thoſe inſtances in which the ſeveral limitations have this view, and are merely of this deſcription: for, as has been already noticed, the rule is not ſo ſtrict, as to controul the *manifeſt* intention, if that intention ſteers clear of the *reaſon* of the rule, *or* of its *literal terms.* The moſt ſtrenuous advocates for a proper and legal application of the rule, muſt admit, that the intention is to be collected, and, if clearly expreſſed, to be obſerved; and after the intention is fixed, the law decides upon it without ambiguity; allowing the intention to govern, as often as it is clear that the word *heirs* is not uſed, as deſcriptive of the *whole claſs* of legal *ſucceſſors*; but in *deſignation* of an *individual*, or of *particular* perſons. The intention, to be obſerved, in excluſion of this rule, muſt be expreſſed in *terms*, manifeſtly exhibiting clear evidence to the mind, that the heirs are not

not to take merely in that *right*, and as anſwering that deſcription. The enquiry, then, muſt be directed, to diſcover the intention, and to ſee whether the ſame is clear of the reaſons upon which the rule depends for effect: For as Lord *Hale*, a character of the firſt reſpectability, very pertinently obſerved in *King* and *Melling* (*o*) in reference to wills, the *intention* is to be *law* to expound the teſtament.—" The true ground of " deciſion is the intent, and the true queſtion is, " what is the intent, and the interpretation is to " ſhew the intent." And as Mr. Juſtice *Buller* (*p*) with equal propriety, and with much greater perſpicuity and preciſion, obſerved, in conſtruction of the ſame ſorts of inſtruments, " There is no " rule better eſtabliſhed than that the intention " of a teſtator, *expreſſed* in his will, *if conſiſtent* " *with the rules of law*, ſhall prevail." " That is " the firſt and great rule in the expoſition of all " wills;—and it is a rule to which all others muſt " bend." It ſays, " *if conſiſtent with the rules of* " *law*," " but it muſt be remembered that theſe " words are applicable only to the *nature* and " *operation* of the *eſtate* or *intereſt* deviſed, and not " to

(*o*) 1 Vent. 214. 225. 2 dev. 59.

(*p*) In *Hodgſon* and *Ambroſe*.

" to the *conſtruction of the words.* The queſtion " whether the intent be conſiſtent with the rules " of law or not, can never ariſe, *till it is ſettled* " *what the intention was.* This can only be diſ- " covered by taking the whole together.—If it " be apparent, I know of no caſe that ſays a " ſtrict legal conſtruction or a technical ſenſe of " *any words whatever*, ſhall prevail againſt it, " unleſs a caſe (*q*) which made a great noiſe in " Weſtminſter Hall a few years ago, be conſi- " dered as ſuch. If the intent does not *plainly* " *appear*, I agree that the legal ſenſe of the words " muſt prevail;" and applying his obſervations to the caſe of *Hodgſon* and *Ambroſe* then before the Court of *King's Bench* for their opinion on the effect of a deviſe, which, to ſtate the ſame briefly, was " To the uſe and behoof of *C.* and her aſſigns " for and during the term of her *natural life*, " and from and after the determination of that " eſtate, to the uſe of *Truſtees* therein before " named, and their heirs, *during the life* of the ſaid " *C.* upon truſt to ſupport and preſerve the *contin-* " *gent uſes* and eſtates therein after limitted, from " being defeated, or deſtroyed: and for that pur- " poſe to make enteries and bring actions as " the

(*q*) *Perrin* and *Blake.*

" the caſe ſhould require, but nevertheleſs to per-
" mit and ſuffer the ſaid *C.* and her aſſigns,
" during her life, to receive and take the rents,
" iſſues and profits to and for her and their own
" uſe and benefit. And, from and after her
" deceaſe, then to the uſe and behoof of the
" *heirs of the body of the ſaid C. lawfully iſſuing*;"
And obſerving that if there had been no deviſe
to truſtees, the caſe would be ſo plain that no
man could doubt about it,—he propounded this
queſtion " What then is the nature of ſuch
" deviſe to ſupport *contingent remainders*," and he
anſwered the queſtion, ſaying, "it is a legal and
" technical limitation, the peculiar language of
" conveyancers," — and continued to obſerve
" the effect of this ſort of limitation in a deed,
" is ſettled. There is not ſufficient to turn *words*
" of *deſcent*, into *words* of *purchaſe*. The teſta-
" trix has not ſhewn, by any *other words*, that ſhe
" meant to uſe the technical expreſſions in a dif-
" ferent ſenſe from what the law has put upon
" them, and, therefore, the *legal ſenſe* muſt pre-
" vail."—" It ſeems to me to be falſe logic, to
" put a different ſenſe on any words from what
" *in general* they import to bear, by *mere inference*
" from the *words* themſelves, *unexplained* by
any

" any *others*: though if other words manifeſt the " intent I know of no law that ſays the intent " ſhall not prevail."

In weighing the force and application of this rule, the proper inquiry, in order to the expoſition of words of limitation to the heir or heirs, &c. in doubtful caſes, is *firſt*, whether theſe words are uſed to comprehend *all* the perſons who ſhall *ſucceſſively* anſwer the deſcription, and conſequently, ſhall be words of *limitation*, to enlarge the anceſtor's eſtate; or are uſed as words of *purchaſe*; that is, words deſcribing *particular* perſons as *individuals*, to take in their *own right*; *ſecondly*, what is the legal import of theſe words, conſidered as words of *purchaſe*: and *thirdly*, whether the intention is *manifeſtly clear*, that the words ſhall have the *particular effect* of deſcribing *particular* perſons, rather than, and in direct excluſion of the conſtruction that would be affixed to them, by allowing them to be affected by this rule; under which they will be held to extend, to *any heirs* of the given deſcription, collectively, as a *claſs* of perſons: for unleſs there is ſuch *direct intention*, plainly and clearly expreſſed, the rule muſt take place. Still the difficulty exiſts, of

aſcertaining

aſcertaining thoſe words and expreſſions which are ſufficient to indicate ſuch direct intention; and this is a difficulty that can never be totally removed.

To theſe obſervations it muſt be added (and theſe obſervations are in truth, neceſſary concluſions from the poſitions already advanced) that it is not ſufficient, that the intention ſhall depend on *inference* or *preſumable reaſons*: it muſt be manifeſted by words which are explicit; and words too. that, without any infringement of the rule in *Shelley's* Caſe, at leaſt the *reaſon* and *ſpirit* of that rule; if not in its *literal terms*, may be conſtrued to be a deſignation of *particular perſons*.

The difficulty that has been mentioned does not, in any degree, queſtion the exiſtence of the rule—It does nothing more than point to caſes that leave room for doubt on its application.

To obviate this difficulty in ſome degree, and to elucidate and enforce the obſervations that have been made, it will not be foreign to the purpoſe of this eſſay, to review in detail, the effect of a limitation to the *heirs* or *heirs of the body*

body of an individual, under which the perſons who ſhall ſuſtain this character are to be *purchaſers*.

In caſe the limitation is to the *heirs generally*, the perſon who anſwers that deſcription, at the time when the limitation is made, otherwiſe the perſon who ſhall *firſt* anſwer the ſame, will have a fee;—whether deſcendible to him and his heirs generally, or with a reſtriction to thoſe heirs who are of the *blood* of his *father*, in thoſe inſtances in which the limitation is to the right heir of a *man*, is not clearly aſcertained; nor is it in any wiſe material to the point under conſideration. Of the extent and deſcendible qualities of the eſtate that paſſes by a limitation in theſe words, ſome notice will be taken in the next edition of the Eſſay on Eſtates.

The obſervations that have made on a limitation to the right heirs of a perſon, are equally applicable to a limitation to his heirs of his body, with this diſtinction, though the limitation will veſt *all the eſtate* imported by theſe words, in the perſon who firſt fulfills the character of *heir* according to the terms of the gift, yet it does not

not

not exclude thoſe perſons, who, by any poſſible event, may, at a future period, bring themſelves within the ſame deſcription (*r*). All perſons *ſucceſſively* anſwering that deſcription may take under this gift; for they are within the terms, and therefore ſhall derive the advantage, of the the ſame. The eſtate is wholly in the firſt taker with a *deſcendible*, or, more accurately ſpeaking, a *tranſmiſſible* quality, that will let all ſucceſſive *heirs* of the body of the given perſon, tho' related to the firſt taker only in the *collateral line*, into its meaſure and extent: and ſo complete an owner of *all* the eſtate, is each ſucceſſive taker, that he may defeat the right of every other perſon falling within the terms of the limitation. All the heirs of the body of the perſon to whoſe heirs the limitation is made, take preciſely in the ſame manner, and with the ſame degree of intereſt, and in the ſame relative ſituation, as if the eſtate had veſted in their anceſtor, under a gift to him and his heirs of the given deſcription. The heirs ſucceeding from time to time, *collaterally* to the *firſt taker*, do not take by way of *remainder*; nor does the perſon in whom the character

(*r*) *Mandeville's Caſe*, 1 inſt. 26. b. Wills and al. *v.* Palmer, 5 Burr. 2615. 2 Black. Rep. 687.

character of heir is firſt fulfilled, take the ſame limited degree of intereſt, as if the gift was to *him* and *his* heirs of *his body*. His *brothers* and *ſiſters* are within the extent of the limitation, and they may take in ſucceſſion. Neither do they take ſeparate and *diſtinct eſtates*. Their only ground of claim is that the meaſure of the eſtate does, in its comprehenſive terms, embrace perſons of their deſcription, and confer a right on them. Strictly ſpeaking, they do not take by *deſcent*; for they do not claim under the perſon, in whom the eſtate firſt veſts, as their anceſtor; nor can they, with any preciſion, be ſaid to take by *purchaſe*; for then they would take ſeparate and *diſtinct eſtates*. They take in a *mixed right*: in a right that cannot be eaſily defined, by a *quodam modo deſcent*; a deſcent per *formam doni* under the ſtatute of intails: and when a limitation to heirs or heirs of the body *taken ſeparately*, confers an intereſt of this nature, then it is, that *connected* with an *eſtate of freehold* in the *anceſtor*, the rule applies; and this ſeems to be a poſition ſo clear, that every caſe of this deſcription *neceſſarily* invites the application of the rule. From theſe deductions it appears, that the *previous enquiry* muſt be, what is the true conſtruction of

the limitation to the heirs, or heirs of the body, conſidered diſtinct from the freehold in the anceſtor.—Does it deſcribe all *poſſible heirs* of that deſcription, ſo that it is not confined to *one* or *more* perſons in whom the character of heirs ſhall be firſt fulfilled; or does it by theſe words, independent of words of ſuperadded limitation, extend to the *iſſue*,—or the *iſſue* and other relations of theſe perſons, is the material point to be diſcovered: and the rule in *Shelley's* Caſe will be applicable or not, according to the reſult of this enquiry. That *all poſſible* heirs of the given deſcription are to take in ſucceſſion, from generation to generation, under the name of *heirs* of *the anceſtor*, is to bring the caſe immediately within the rule: and that only *one* or more individuals are to take, in that character, or rather as *particular* perſons deſcribed by that name, either for their *lives* only, or for an eſtate of *inheritance* to be deduced from them as the *ſtock* or *anceſtor*, and that *their* heirs are deſcribed by ſuperadded words of limitation and as *their deſcendants*, is to exclude the rule.—The intention that the heirs are to take by purchaſe or not, ought to form no part of the enquiry. The ſingle point to be decided, is in what manner

ner they are to take; *generally*, without exception, as a claſs of inheritable perſons, and as the ſucceſſive heirs of the perſon to whom the preceding eſtate of freehold is limited; or *partially* as *individuals* ſelected out of the claſs of heirs, for an eſtate, which, ſo far as it depends on the limitation to the heirs, as heirs, &c. of their anceſtor will determine with their *deaths*, and ſo far as it is of an *inheritable* quality, will intitle thoſe heirs *only*, who, deducing their pedigree from theſe *individuals*, are to look up to them as their common ſtock, from whom their deſcent is to be derived, the ſame as if the anceſtor of theſe individuals, had not been named.

It is upon theſe grounds that the deciſion of *Perrin* and *Blake* (*s*) in the *Exchequer Chamber* is more ſatisfactory than the one pronounced in the Court of *King's Bench*.

In that caſe the deviſe, ſo far as it is material, was made by Mr. Williams in theſe words; "Should my wife be enſient with child, at any

(*s*) 4 Burr. 2579. 1 Black. Rep. 672. 1 Collectanea Juridica.

" time hereafter, and it be a female, I give and bequeath unto her the ſum of £2000, &c. " And if it be a *male*, I give and bequeath my " eſtate real and perſonal equally to be divided " between the ſaid infant, and my ſon *John Wil-* " *liams*, when the ſaid infant ſhall attain the age " of twenty-one. *Item* it is my intent and mean- " ing that *none of my children ſhall ſell or diſpoſe* " *of my eſtate for longer time than his life*; and *to* " *that intent* I give, deviſe, and bequeath all the " reſt and reſidue of my eſtate to my ſon *John* " *Williams* and the ſaid infant for and during " *the term of their natural lives*: the remainder to " my brother-in law *J. G.* and his heirs for and " during the lives of my ſon *John Williams* and " the ſaid infant, the remainder to *the heirs of* " *the body of my ſaid ſon John Williams* and the " ſaid infant lawfully begotten or to be begotten, " the remainder to my *daughters*, *&c.*"

It is by obſerving on this caſe, that the rule may be brought to the teſt, and illuſtrated. That this caſe did or did not call for the application of the rule, was a point, on which a great diverſity of opinion was entertained. Men of the firſt eminence differed in their ſentiments on the con-

ſtruction

ſtruction of this will.—In the *Exchequer Chamber* it was held by a majority of the judges, that the rule did apply to this caſe; and the judgment of the Court of King's Bench, pronounced upon the opinions of Lord *Mansfield* and Juſtices *Willes* and *Aſton*, againſt the opinion of Juſtice *Yates* who argued very ably and ſtrenuouſly for the application of the rule, was reverſed.

Now, trying the ſolution of the law on this will, by the modes of enquiry that have been recommended for aſcertaining the application of the rule in doubtful caſes, it is clear that the caſe of *Perrin and Blake* was completely within the *reaſon* and the *terms* of the rule—without any circumſtance, beſides the intention of the teſtator, (collected from the expreſs eſtate for life, and the limitation to ſupport contingent remainders) that the heirs ſhould take *diſtinctly* from their anceſtor, to ſhew that the teſtator did not uſe theſe words as words of *limitation*, that is, as comprehending the *whole claſs* of heirs: and this intention, ſo far from negativing the application of the rule, is the very reaſon from which it had its origin. It was clear that the teſtator intended that the *ſucceſſive*

heirs of his *ſon*, and not merely *one* or *more* individuals in particular, ſhould be intitled under the limitation to the heirs of his body. He might have intended, and moſt probably he did mean, that the *firſt* and other *ſons* ſhould take *ſucceſſively* in their *own right*, apart from their anceſtor, an eſtate tranſmiſſible from them to their heirs in tail. But to the words he uſed, in the general and unqualified manner in which they were introduced, the law has appropriated no ſuch meaning, and therefore. it could not affix to them any ſuch ſenſe, The words heirs of the body unexplained by any *adjunct* or *declaration* (*t*) will not in a Court of *law* admit of this interpretation; and even in a caſe *(u)* in which words pointing to a *ſucceſſion* of the heirs according to *ſeniority*, and by way of *remainder*, and others of a correſponding and ſtill ſtronger import were uſed, it was determined that they were not ſufficient to turn the word heirs, &c. into words of purchaſe, deſcriptive of the *firſt* and other *ſons*, as *diſtinct* perſons, unconnected with, and independant of their character of *heirs*.

In

(t) See *Hodgſon* and *Ambroſe*. ſupra.

(u) *Legate* v. *Sewell*. 1 P. W. 87. 1 Eq. Abr. 394.

In *Perrin* and *Blake* to have given each reſpective ſon, according to his ſeniority, an eſtate tail, ſo that each ſeveral ſon might have a veſted eſtate at the ſame time, one *in poſſeſſion* the others in *remainder*, would have been to annex to the words heirs of the body, a ſenſe of which they do not admit in a Court of Law. No Court regulating its deciſions by the ſtrict rules of the *Common Law*, has ever yet gone ſo far as to put ſuch a liberal conſtruction on theſe words, ſtanding alone and undefined, as to determine that they ſhall give *ſeveral* and *diſtinct* eſtates to *diſtinct* perſons, when theſe perſons all come under the ſame denomination, and are deſcribed by a *general* term as a *collective claſs* of perſons. The caſes of *Mandeville* (*v*), and *Wills* and *Palmer* (*w*) go the length to negative this conſtruction, by ſhewing that the law will give all the eſtate or degree of intereſt imported by theſe words, to the firſt taker; even in thoſe inſtances in which the heirs are *unqueſtionably* to be intitled as *purchaſers* by that name of deſignation, and that name embraces other perſons who may ſucceſſively anſwer the deſcriptive terms of the limitation to the heirs; and to have determined that any

(*v*) 1 Inſt. 26 b.
(*w*) 5 Burr. 2615. 2 Black. Rep. 687.

any individual, or the perſon in whom the character of heir ſhould be firſt fulfilled, would take excluſively of all the other perſons who might anſwer the deſcription, and that the gift ſhould be confined to that perſon and his heirs of his body, would have been to abridge the gift, to the prejudice of other perſons who were clearly and equally the objects of the limitation. For theſe reaſons it ſeems agreeable to firſt principles and every rule of conſtruction, to conclude that the heirs were intended to take as a *claſs* or *denomination* of perſons, and not as *individuals* particularly ſelected out of that claſs or *denomination*; and ſince under the will which gave riſe to the queſtion in *Perrin* and *Blake*, they were to take in this manner, and their anceſtor had a preceding eſtate of freehold, there was no well founded reaſon to contend that this eſtate did not attract to him the benefit of the limitation to his heirs.

'Tis true that in the conſtruction of *articles* for a *marriage* ſettlement, the Court of *Chancery* exerciſing its *equitable juriſdiction* to correct the manifeſt *errors* of the parties, does, in ſome caſes, conſtrue a limitation to the heirs of the body to give an equitable intereſt in tail to the *firſt* and other

other ſons. But this practice furniſhes no argument for a ſimilar conſtruction of theſe words in a Court of law. The Court of *Chancery* itſelf allows that the *legal* and *proper* conſtruction of theſe words, is that which reſults from the concluſions to be drawn from the rule in *Shelley's* Caſe; and even admits the neceſſity of changing the words, in order to give the intention that effect *at law*, which is agreeable to its own *equitable interpretation* or rather *interference*.

It will be material alſo to obſerve that, generally ſpeaking, the doctrine is equally applicable to limitations of the *legal eſtate*—limitations of *uſe*,—and limitations of *truſt*: and extends as well to *copyhold* as to *freehold* lands and tenements.

It will be right alſo to premiſe that in thoſe caſes in which the owner of an eſtate, either *freehold* or *copyhold*, limits the ultimate intereſt, (being the fee) to his *right heirs*, by way of *uſe*; in the caſe of *freehold* lands, either upon a *conveyance* or declaration of uſes (*x*); and in the caſe of copyhold

(*x*) *Fenwick* and *Mitford* Mo. 284. 1 Leon. 82. 1 Inſt 22 b. 1 Co. 100. *Reade* and *Morpeth* Cro. Eliz. 321. Sir T. *Tippen's* Caſe. 1 P.W. 359. Earl of *Bedford's* Caſe, Mo. 718. Poph. 3.

copyhold lands upon a ſurrender to uſes (*y*), he has the *fee*, as his *old reverſion*; and as to this point ſo far as relates to *freehold lands*, it makes no difference, whether an eſtate of freehold is limited to *his uſe*, or an eſtate of freehold is limited *to the uſe* of any other perſon, expreſsly for the exact period of his life, or he has an eſtate *for years* by expreſs limitation. A limitation to the *uſe* of his *heirs of his body*, is not affected by theſe obſervations; for unleſs the author of the uſes, takes a preceding eſtate of freehold by limitation, or reſulting uſe, his heirs of this deſcription, will, under a limitation to them, take by *purchaſe* (*z*); and if the anceſtor takes a preceding eſtate of freehold, the *rule* which is the ſubject of this eſſay, applies to the ſeveral limitations, and his heirs of his body cannot be intitled, otherwiſe than by deſcent from him.

Since a man cannot deviſe an eſtate to himſelf, no limitation in *his will* to his *heirs* or *heirs of his body*, can become the ſubject of the rule, for want of an eſtate of freehold in the anceſtor; and in

(*y*) *Roe* v. *Griffiths* 4 Burr. 1952. Thruſtout ex dem *Gower* v. *Cunningham*, Fearne 90. 2 Black. Rep. 1046.

(*z*) *Elſe* v. *Oſborne*. 1 P. W. 387.

in *deeds* operating *ſolely* by *conveyance* at *common law*, a man cannot, with effect, limit any eſtate to himſelf, or to his *heirs*, or *heirs* of his body *as ſuch*, and under *that appellation*.

In wills, a deviſe by a man to *his heirs of his body*, will create an intail, in favor of thoſe perſons who are within the deſcriptive terms of the deviſe, as *purchaſers (a)*, in the manner already noticed, and as will appear in the eſſay on eſtates, under the chapter which treats of eſtates tail; and a deviſe by a man to his *right heirs*, by that name, with an intention that they ſhall have the fee, *is void*; and they will have the reverſion by deſcent, as his heirs, without any regard to the rule profeſſedly treated of in this eſſay.

To the generality of the poſition, that a man cannot make himſelf, or his heirs by that name, *purchaſers*, by a limitation in a conveyance at the common law, the validity and effect of a limitation to him, in a fine *ſur grant & render*, has the ſemblance of an exception. It muſt be allowed, that the *render* of a fine of this ſort, may give an eſtate to the granting party, or to his heirs

(a) *Wills* v. *Palmer*.

heirs as purchaſers by that name, and that, in point of fact, the fine, collectively conſidered, is the conveyance of the perſon, who gives effect to the grant in that fine. In legal intendment however, the perſon who makes the *render* is conſidered as the author of the *eſtates* limited back to the original owner, or to other perſons. The inſtrument is conſidered as a *double conveyance*, as a *grant* and *reconveyance* made by ſeveral, and diſtinct inſtruments; and therefore this caſe is neither within the terms or the ſcope of theſe obſervations. It was thought proper to notice this caſe, that no confuſion might ariſe, from the impreſſion which it might have made, before it had been ſufficiently weighed, and the reaſon that occaſions the difference had been conſidered.

And it is alſo to be obſerved, that when the word heirs, connected with an eſtate of freehold in the anceſtor, is uſed in deeds or wills, to deſcribe a claſs or *denomination* of perſons, and under the rule now in diſcuſſion that limitation might have given the intereſt to the anceſtor, this limitation will fail of effect, unleſs, at the teſtator's death, the anceſtor is living to take the intereſt; and the heirs can not take by *purchaſe* though their

their anceſtor never was in a ſituation to have the freehold, and though they would have been intitled as *purchaſers*, if their *anceſtor* had not been named to take the previous eſtate (*b*).

And it is alſo to be underſtood, that there are ſome caſes, falling under the *literal terms* of the rule, that are not within its extent and application. Theſe caſes will be noticed, in the ſequel of theſe obſervations, as forming exceptions to the rule. They comprehend thoſe limitations in *deeds*, *wills*, and other *writings* in which the words "Heirs or heirs &c." are uſed and *explained*, in a ſenſe that makes them words of purchaſe, and of the ſame import; in ſome inſtances as the *firſt* and other *ſons*, &c. or a *particular* ſon of the anceſtor, and *his* or their heirs of his or their bodies; and in other inſtances, as *all* the *children* of the anceſtor, and the heirs of the bodies of theſe children, in lineal *ſucceſſion* from *them*, according to the rules of deſcent; and in other inſtances, as a particular *perſon*, diſtinguiſhed at preſent, by a title or deſcription that he, of all others, is moſt likely to anſwer and fulfill at a future period.—They alſo comprehend thoſe limitations in *marriage articles* in which, from the nature of the proviſion

(*b*) *Hodgſon* v. *Ambroſe*.

proviſion, the parties muſt have meant that the *firſt* and *other ſons*, &c. ſhould take by *purchaſe*, or they have entered into an agreement, which, *ſo far as relates to the heirs*, can give no certain advantage to them.

And it muſt alſo be underſtood, that the word *iſſue*, uſed in wills in the ſame ſenſe and as a ſubſtituted term for heirs of the body, is within the ſcope and extent of the rule.—As to thoſe caſes in which it has been held in the conſtruction of *wills*, that an eſtate of inheritance has paſſed under limitations to *ſons*, or *children*, in theſe terms, when the anceſtor takes a preceding eſtate of freehold, they are to be referred, ſome to the *third*, others to the *fourth* rule propoſed for the interpretation of wills, under that chapter in the eſſay on eſtates, which treats of eſtates tail. Theſe rules are expreſſed with a trifling variation in the language, which is noticed by *italics* and the omiſſion of the marks of quotation, in the following words (*c*), "When it appears to be the intention of a "teſtator, that all the iſſue of a perſon to whom "a deviſe is made, are to take under his will, "and they cannot *all* take, unleſs an eſtate tail "paſſes to the anceſtor, the anceſtor ſhall have "an

(*c*) Page 361.

" an eſtate tail, that his iſſue may take in ſucceſ-
" ſion from him; and a deviſe to him for life
" by expreſs words, will not prevent this con-
" ſtruction.

" When there is a manifeſt intention on the
" part of a teſtator, in favor of the iſſue of a
" deviſee generally, or ſome of them in parti-
" cular; and there is alſo a *particular* intention,
" according to which the iſſue are to take in a
" *manner different from that in which* they can have
" the land if they are to claim in ſucceſſion from
" their anceſtor, the will ſhall be conſtrued ac-
" cording to the *general* intention, and not be
" confined to the *particular* one, and the deviſee
" ſhall have an eſtate tail."

It is the *eſtate of freehold*, which, with the exceptions that have been noticed, and are to be obſerved on in the ſequel, *attracts* to the anceſtor, the *eſtate* imported by the *limitation to his heirs*. The rule is, by ſome thought to be of feodal origin (*d*), or to be accounted for only upon the principles of that ſyſtem of tenures, and the conſequential fruits of ſeignory. This was

(*d*) 4 Bac. Abr. 301.

was the opinion of Juſtices *Aſton*, *Willes*, and *Yates*, delivered in *Perrin* and *Blake* (*e*): the firſt of whom ſaid, "The maxim itſelf grew with "feodal policy;" the ſecond that "It was an old "rule of feodal policy; and the third that "The "rule had its origin in feodal policy, and grew up "in days when the law favored *deſcents* as much "as *poſſible*."—After the time that *wardſhips*, *reliefs*, and other incidents of tenure, flowing from hereditary eſtates, were introduced into this ſyſtem of property, it was accounted a fraud upon the Lord, who was intitled to theſe fruits and incidents upon the death of his tenant, and the ſucceſſion of the heir, that there ſhould be a power to give the eſtate to the anceſtor for his life only, and of extending that eſtate to his *heirs*, *quatenus* they were his heirs: ſo that the heirs ſhould be intitled preciſely in the ſame manner, as if they took by hereditary ſucceſſion, and at the ſame time, take as *purchaſers* in their own right, and, as a conſequence, defeat the Lord of the fruits that he would be intitled to have, upon a ſucceſſion from the anceſtor. On this account, and with great reaſon, this rule is ſuppoſed to have been framed, to give the eſtate to the anceſtor, that the

(*e*) Collectanea Juridica, 298. 305. 312.

the heirs might take by hereditary ſucceſſion, in a courſe of deſcent, and the Lord have the fruits of his ſeignory; and in truth, the ſtatute *(f)* enacted for anulling feoffments, made *fraudulently*, to thoſe who *muſt* be the heirs of the feoffor, to defeat the Lord of his wardſhip, is a *legiſlative* proviſion, levelled againſt the ſame ſort of injury. For in theſe days, wardſhip was the moſt valuable fruit ariſing to the Lord from his ſeignory:—and the *King* in particular was very much concerned to prevent all unfair means of depriving Lords of this incident of tenure, and they could be deprived *only* by the tenants introducing the *heir* to the *Lord* as a *purchaſer*, inſtead of ſuffering him to be intitled by *deſcent*. The ſtatute which has been mentioned, provided againſt the practice of conveyances by fathers to their *eldeſt ſons*; and, probaby, to elude the ſtatute in that particular caſe; and in other caſes, as between perſons becoming purchaſers and their *heirs*; feoffments and conveyances were made, under which the father or purchaſer would take an eſtate for life, with a *remainder* to his *heirs*: and the Courts of Juſtice, perceiving the frauds committed againſt Lords by this practice,

(f) 52. H. 3. c. 6.

tice, which, if indulged, would have totally deprived them of their right to *wardſhip*, put that conſtruction upon the *ſeveral limitations* which they receive at this day. For it is evident from the ſtatute which has been mentioned, that tenants made a general practice of deviſing means to deprive the Lord of his wardſhip, and that the legiſlature was anxious to afford relief to the Lord; and it may, therefore, very fairly be concluded, that one of the means, deviſed for the purpoſe of defrauding the Lord, was to make the conveyance to the anceſtor and his heirs, by ſeveral limitations, with an intent that the heirs ſhould be *purchaſers*, and that the Courts of Juſtice, acting upon the ſpirit of this ſtatute, or perhaps upon ſome ordinance which then had the force of law, applied to the ſeveral limitations that conſtruction, under which it is, at this day, held that the limitation to the *heirs* gives the inheritance to the anceſtor. At leaſt without ſuch conſtruction the proviſions of this ſtatute might have been eaſily eluded.

Others, (*g*) on the contrary, have been of opinion, that the rule owes its exiſtence to the relation

(*g*) Mo. 720. Fearne 113. cites Ch. Baron *Gilbert's* M. 6. 8.

relation between the *heir* and the *anceſtor*, and the genuine conſtruction of the law, which, they contend, holds a limitation to a man and his *heirs*, or *heirs of his body*, by *ſeveral* and *diſtinct* clauſes, and even with a diviſion of the time or intereſt, to paſs by theſe limitations, to be of the ſame nature, import and extent, as a limita- to a man and his heirs, or heirs of his body, by one connected clauſe of limitation; with the difference only, that when the limitations are ſeveral and diſtinct, and eſtates are ſubſtituted intermediately, the intermediate eſtates muſt have priority, according to the order of their limitation. Thus Chief Baron *Gilbert* (*b*), in accounting for the caſes falling under the rule, among other conjectures, refers "their principle "to the conformity or parity of reaſon" that ſeveral limitations,—one to the anceſtor,—the other to his heirs,—"bear to a limitation to A. "and his heirs—or heirs *male* or *female* of his "body;" and reaſons thus, "as the one gives "an eſtate for *life* by implication *and more*, ſo "the other gives the *ſame* in expreſs words *and* "*more*; and *expreſſio eorum quæ tacite inſunt* "*nihil operatur*. And the interpoſition of ano-

(*b*) Fearne, 14.

"ther eſtate between them, only breaks the *order* "of the limitation, not the *operation* of the "words: which being the ſame in both caſes "ought to have the ſame operation and con-"ſtruction."

To this effect alſo are the obſervations of Mr. *Fearne* (*i*) who ſays, in one paſſage, "In "truth the only ſubſtantial difference, between "a limitation to A. and his heirs; and a limi-"tation to him for life, remainder to B. in "tail, remainder to the *right heirs of* A; ap-"pears to be, that in the firſt inſtance, A. takes "the *entire eſtate* in fee, and, in the other caſe, he "takes it *divided* by, and *ſubject to the eſtate tail* "in B. The words *his* heirs, in either caſe, "operate equally as words of *limitation*, viz. "words giving the eſtate imported by them, *not* "*originally* to the *expreſs objects of the deſcription*, "but extending the anceſtors eſtate, *immediately* "in the one caſe, and *mediately* in the other, to "them by *deſcent*, and limiting the ultimate "bounds of the eſtate which he is to take."— "And in another paſſage (*k*), "If we conſider "the freehold, what in truth it is, a portion of the

(*i*) Page 106. (*k*) Page 309.

" the inheritance, the rule ſays no more than that " you ſhall not apportion and divide the inheri- " tance between the anceſtor and a line of ſuc- " ceſſors, claiming under a denomination belong- " ing to them only as his repreſentatives, to an " inheritable eſtate, derived from, or under " him."—But, with great ſubmiſſion, theſe obſervations are concluſions, reſulting rather from the *determinations* on the rule, than from any general interpretation of the law. They are the *effect* of the rule, and not the conſtruction of the caſes.—In a general point of view, the caſes do not require *this interpretation*, but the rule adapted to theſe *particular* caſes determines that they ſhall receive it.

Since the diſtinction between eſtates for life and in fee was already marked, and it was a ſettled point that the owner of a fee might, at leaſt with the conſent of his Lord, diſpoſe of his eſtate to the excluſion of his heirs not being his *iſſue in tail*, it is highly improbable that the fee would have been conveyed to him by the circuitous

terms of ſeveral limitations, one to him for his *natural life*—the other *after his deceaſe*, to his heirs.—Theſe expreſſions tend ſtrongly to diſcover an intention that the anceſtor ſhall have no greater intereſt than for his life, and that, after his deceaſe, his heirs ſhall be intitled in their own right; and if ſuch is the apparent intention, what rule of *conſtruction* denies effect to the ſame? To defeat that intention, it was neceſſary to introduce a *negative* rule; a rule, which for ſome reaſon of policy, ſhould contravene this intention: and of this deſcription may the rule in *Shelley's* Caſe be very properly conſidered.

And by way of caution to the conveyancer, it will not be ſuperfluous to obſerve, ſince the practice does not appear to have been ever adopted, that a certain way to avoid any queſtion on the rule, indeed to preclude all doubt, when he *intentionally* uſes the word heirs as a word of limitation, is to make the limitation to the *perſon* and his *heirs*, or heirs of his body, even though there is a previous *limitation* to the anceſtor of an eſtate

eſtate of freehold. In this mode of limitation there is no abſurdity at law, though there may be an apparent incongruity in terms; for there cannot be any impropriety in making the ſecond limitation, as well as the firſt, to the *perſon* himſelf, ſince the law concludes that a man, who has an eſtate for life, or an eſtate tail, may alſo have another remote intereſt, for example the fee; or an eſtate tail, when he takes only an eſtate for life under the former limitation; or a more *enlarged* eſtate tail, in thoſe inſtances that he takes a previous and *ſpecial* eſtate of that denomination. To introduce the word *heirs* into any inſtrument as a word of *purchaſe*, is always improper, becauſe that word has an *equivocal*, and, uſed in this manner, only a *conſtructive* meaning. There are words of definite meaning, that leave no room for the aid of rules of conſtruction, and that aſcertain the objects of deſcription ſo preciſely, that no queſtion can be raiſed on the intention they are to expreſs. Hence the advantage of an intimate acquaintance with the law of aſſurances, and the *legal import* of words, ſince an extenſive knowledge of the law on this ſubject enables the practitioner to defy either the ſophiſtry of argument, or the

power that leaves Courts of Juſtice at liberty to decide on doubtful queſtions, in their diſcretion, which, though exerciſed with a well meant regard to the intention of the parties, often defeats that intention. In ſhort, the art of the conveyancer is properly exerciſed, and his ſkill and knowledge, as well at his caution and regard to the intereſt of his employer, moſt judiciouſly diſplayed by the uſe, in thoſe inſtances in which it is in his power to introduce them, of words and phraſes of a fixed and acknowledged import; and, in thoſe inſtances, in which words of this deſcription cannot be found, by adding ſuch explanatory declarations as clearly expreſs the intention, and conſequently, leave no room for *diſcretionary* conſtruction.

Leaving it to the diligence of the ſtudent to ſatisfy himſelf of the policy that in the firſt place gave riſe to, or called for, the adoption of the rule, it may be aſſumed, as a certain and incontrovertible poſition, warranted, in its fulleſt extent, by practical obſervation, that the object of the rule, is to give to the anceſtor, *taking an eſtate of freehold*, the intereſt imported by the limitation to his heirs, ſo as to confer on him the ownerſhip

of

of that eſtate, and make it deſcendible *from him* to *his* heirs, in the regular line of ſucceſſion; preciſely in the ſame manner as if the limitation to *his* heirs, was to *him* and *his* heirs, &c. and ſince this is the implied conſtruction of the law upon the ſeveral limitations, it muſt be allowed that there will be no impropriety, much leſs any abſurdity, in following the advice that has been offered, to give the eſtate, by the ſecond clauſe, to the *anceſtor* and his *heirs* of his body, inſtead of making the limitation to the heirs of the body, without taking any notice of the anceſtor.

That this was the object of the rule, is clear from the caſes to which it is applied at this day, and 'tis from its application alone, that any concluſions can now be drawn to the reaſon of the rule. The reports of the old caſes are ſilent on the reaſon of the rule, and leave it to conjecture to diſcover them; and till the Caſe of *Shelley* received its deciſion, very few caſes had invited, or at leaſt involved, a diſcuſſion of the rule; and when that caſe firſt aroſe, the rule does not appear to have been underſtood or acknowledged as a general and univerſal poſition, perfectly ſettled and received as an *axiom*.

The

The opinions advanced by the gentlemen who argued that caſe, and who were of the moſt diſtinguiſhed abilities, and, afterwards, filled the firſt ſeats of Judicature in different departments, make this pretty evident. The caſes cited in Lord *Coke*'s report, as thoſe by which the rule was proved, are all taken from the *year books* in the time of *Edward the Third.* Of theſe caſes, that of the *Provoſt of Beverly* (*l*), which was before the Court in the fortieth year of that reign, is the moſt modern. It aroſe upon a fine *ſur grant & render*, by which lands were ſettled upon John Sutton the granting party in the fine, for his life, remainder, after his death, to John his ſon, and to Eline his wife, and the heirs of their bodies begotten; and, for default of ſuch iſſue, remainder to the right *heirs* of John the father: John the father and John the ſon were dead, and Eline was alſo dead, and there were no iſſue of herſelf and John her huſband. Richard, another ſon of John the father, entered, claiming as a *purchaſer* under the limitation to the *right heirs* of his *father.* The effect of this limitation came in queſtion, upon a diſtreſs for a relief, a replevin, and conuzance by the bailiff of the

(*l*) 40 Edw. 3. 9.

the provoſt of Beverley, ſetting forth the limitations, and juſtifying upon the ground that a relief was payable. The plaintiff in replevin concluded to the Court, demanding their judgment, if the avowry for the relief could be ſupported. The arguments on the part of the plaintiff, as well as ſome caſes cited in ſupport of theſe arguments, were directed to ſhew, that the limitation to the *heirs* gave the eſtate to *Richard* by *purchaſe*. The Counſel for the avowant argued that Richard became intitled by *deſcent* from his father. Whether *Candiſh* and *Thorpe* were on the bench, or of Counſel with the avowant, is not clear. The former ſaid, " If the leaſe " had been to the father for *life*, the remainder " to his *right heirs*, the father would have had " the fee," and concluded that becauſe " the leaſe " was to the father for his life, the remainder to " John his ſon in tail, the remainder to the right " heirs of the father, if Richard" (the ſecond ſon) " had been then *under age*, the Lord ſhould " have had the *wardſhip*, and, by conſequence, " he ſhould have relief." He added " If a writ " of right had been brought againſt John" (who was tenant in tail) " after the death of his father, " he might have joined the *wife* in his own right,

" and

" and in no other right," and this he ſaid "proved " that he had the fee ſimple."

Thorpe, in anſwer to *Finchden*, of Counſel with the Plaintiff in replevin, obſerved, " that the " objection was to pay a relief, becauſe Richard " became intitled as a purchaſer, in regard that " he was the firſt perſon in whom the remainder " could take effect by the words of the remainder, " but" continued he " your title is as *heir* to your " father, and your father had the *freehold preced-* " *ing*, and if John his ſon and Eline his wife had " died"—(without iſſue it muſt be intended) " in his life time, he would have been tenant in " fee ſimple, and, for this eſtate, might have " brought a writ of right, and the remainder was " not at all limited to *you* by your *proper name*, " but as *heir*;" and, for *theſe reaſons*, it was awarded by all the Juſtices that a return ſhould be made, conſequently that Richard took by *deſcent*, and a relief was payable.

Of all the caſes particularized in the report, this alone is intelligible; and it is the only one from which any concluſion to the rule under conſideration can be drawn. This caſe however is ſo clear and preciſe to the point, that it leaves no doubt

doubt on the deciſion, and it is material that one of the expreſs grounds of the adjudication, was that the anceſtor had a *freehold preceding*.

There are ſome caſes of an earlier date, and a few ſubſequent to this deciſion and prior to *Shelley's* Caſe, all enforcing the ſame rule (*m*). The moſt early caſe in our books was determined in M. 18. Ed. II. (*n*), and one of the reaſons aſſigned by the Court, for conſtruing the heirs to have taken by deſcent, was that otherwiſe the *fee* and the *right* would, after the determination of prior eſtates of inheritance in tail, *have been in nobody*. A circumſtance which is very remarkable, is that none of theſe caſes take any notice of the policy that induced the Courts to put this conſtruction upon ſeveral limitations to the anceſtor and his heirs; and Mr. Juſtice *Blackſtone* (*o*) in delivering his opinion upon *Perrin* and *Blake*, while before the Court of Exchequer, upon a writ of error, held it by no means clear "That this "rule took its riſe, merely from *feodal* principles; "he was rather inclined to believe it was firſt eſtabliſhed

(*m*) F. N. B. 196 H. 5 Edw. 4. 2. 11. H, 4. p. 227. b.

(*n*) Mayn. Edw. 2. fo. 577.

(*o*) Harg. Law Tracts 1 vol. 498. 500.

" eſtabliſhed to prevent the inheritance from be-
" ing in *abeyance*, and that one principal founda-
" tion of it was to obviate the miſchief, of too
" frequently putting the inheritance in ſuſpence,
" or abeyance. Another foundation," he ſaid,
" might be, and was probably laid in a princi-
" ple diametrically oppoſite to the genius of the
" feodal inſtitutions; namely a deſire to facili-
" litate the alienation of land, and to throw it
" into the track of commerce, one generation
" ſooner, by veſting the inheritance in the anceſ-
" tor, than if he continued tenant for life, and
" the heir was declared a purchaſer."

Againſt the firſt branch of this hypotheſis, it may be fairly alledged, that it proves nothing, or proves the very point which is inſiſted on, For, as between whom except the *Lord* and *tenant*, or how as between them unleſs it was in regard to the fruits of the ſeignory, could there have ariſen any difference whether the inheritance was veſted or in abeyance. The doctrine of the law, requiring that contingent eſtates of freehold ſhall be ſupported by preceding particular eſtates of the ſame quality, and that ſuch contingent eſtates of freehold ſhall be void in event, unleſs they become

become veſted in intereſt before the determination of *all* the particular eſtates of freehold by which they are preceded, and in relation to which they are remainders, had abundantly provided for the inconveniencies that might otherwiſe have ariſen to *ſtrangers*, or, in any other reſpect than ſo far as relates to the fruits of ſeignory, even to the *Lords* themſelves: and there is no trace from which it can be fairly inferred, that a wiſh to facilitate the powers of *voluntary* alienation, in the then generation, could, at this early period, in any degree, have influenced the deciſions of the Courts of Juſtice. The proviſions of the ſtatute *de donis* made about this time *(p)*; the low, though improving ſtate of commerce; and the fettered terms impoſed upon eſtates, are ſtrong arguments to be urged againſt the ſecond branch of the hypotheſis.—Beſides, to account for the rule, by this branch of the hypotheſis, is to aſſign a cauſe by no means equal to, if at all correſponding with the effect, eſpecially in the application of the rule to limitations to *heirs* of the body; ſince it was not till till the reign of the *fourth Edward* that an eſtate *tail* conferred the power of aliening the inheritance; and, even in this advanced

(p) The reign of the *firſt Edward.*

vanced period of eſtates tail, the alienation was made under a mode of aſſurance invented for the very purpoſe of evading, through the medium of a fiction, the expreſs proviſions of the ſtatute of intails, commonly cited under the name of the ſtatute *de donis*.

To return to the conſideration of the circumſtances that call the rule into operative force. That the rule may apply, the anceſtor muſt take a *preceding* eſtate of *freehold*, either *by limitation*, *by reſulting uſe* (*q*), or *implication of law* (*r*), and muſt take that eſtate by, under, or as conſequence of, the *ſame* deed or inſtrument that contains the limitation to his heirs; for in thoſe inſtances that the eſtate limited to the anceſtor, is *for years only*, and he takes no eſtate of freehold (*s*), or an eſtate of freehold is limitted to him by one deed or inſtrument, and the limitation to his heirs is by *another* deed or inſtrument (*t*), (without

(*q*) *Pybus and Mitford* 1 Vent. 372. *Wills and Palmer*, ſupra.

(*r*) *Hayes and Ford* 2 Black. Rep. 64.

(*s*) *Tippins Ca.* 1 P. W. 359. *Harris and Barnes*, 4 Burr. 2157. 1 Inſt. 319. b.

(*t*) *Moor and Parker*. L. Raym. 37. *Fonereau v. Fonereau* Doug. Rep. 470. *Snow and Cutler*. 1 Lev. 135.

out any regard to the priority of the inſtruments to which one, or the other of the limitations owes its exiſtence, and under which it is to receive effect) the rule has no application; unleſs the limitation to the heirs is in a deed of appointment to uſes, taking effect under a power, inſerted in the ſame deed, that contains the limitation of the eſtate of freehold to the anceſtor; and in that caſe, it ſeems to be doubtful, whether the ſeveral limitations will unite and conſolidate, ſo as to give the anceſtor the intereſt imported by that limitation or not (*u*). The inclination of the opinion of thoſe, who ſeem beſt verſed in this learning, is, that the ſeveral limitations will conſolidate. To this opinion, there are ſome objections. The ſtrongeſt, and one which does not appear to have been yet ſuggeſted, is that an intereſt, *once determined to be an eſtate for life*, without any reference to or connection with the *inheritance* in the tenant of that eſtate, will, by ſubſequent matter, and, in ſome caſes, by the act of a third perſon, become an eſtate of inheritance. Another objection is, that the heirs cannot, in reference to the eſtate of their anceſtor, take by way of remainder. And, in the opinion of Mr.

(*u*) *Fearne* 99. *Butler* on 1 Inſt. 229. b. n. 1.

Fearne (*v*), the rule has no application, in thoſe inſtances in which the anceſtor has the freehold merely as a *truſtee*; taking no *beneficial intereſt* in that eſtate. This poſition ſeems equally queſtionable. It proceeds upon a ſuppoſition, that the anceſtor has the beneficial intereſt of the limitation to his *heirs*, merely in reſpect of, and becauſe he takes a beneficial intereſt under, the limitation to himſelf; and aſſumes it as a ſettled point, that the law recognizes the truſt of the eſtate of freehold limited to the anceſtor; while reſorting to the firſt principles of Law, and the ſpirit of the rule, the declaration of truſt, annexed to the limitation of the freehold to the anceſtor, does not appear to make any difference. It is not clear that the law can take any notice of this equitable intereſt; and if it recognizes that intereſt, ſtill, in any point of view, the two limitations are equally the objects of the rule.

They involve every reaſon that made it neceſſary to frame the ſame, for if this caſe had happened while wardſhip and other fruits of ſeignory were the conſequences of the tenure, it would have been equally as injurious to the Lord

(*v*) Page 39.

Lord that the *tenant* ſhould take by purchaſe, as if the anceſtor had received the freehold, diſcharged of the truſt. And to allow that the rule does not extend to a caſe with theſe circumſtances, is to depart from the terms of the rule, and the ſpirit of the ſame, ſo far as that ſpirit can now be collected.

Nor is the Caſe of *Moor* and *Parker (w)* (the leading authority for the poſition that the ſeveral limitations to the anceſtor and his heirs, muſt be contained in, or *mediately* or *immediately*, owe their effect to the ſame inſtrument) over-ruled by the determination of *Hayes* and *Ford (x)*; a caſe which aroſe on a deviſe by a man to his brother N's ſons, after, and in remainder of, a limitation to his brother W. and his heirs males; in which the teſtator, by a *ſchedule* annexed to his *will*, and *referring thereto*, and, by a ſpecial verdict, found to be *part thereof*, and purporting to be an account of the manner in which he had thereby diſpoſed of his property, ſaid "And for want of his brother W's having "ſons, then to his brother N's ſons, and for want

(w) Supra. (x) Supra.

" of ſons, then over;" and on an appeal from the Court of K. B. in *Ireland*, where it was held, that none of the ſons of N. took only an eſtate for life, to the Court of K. B. in *England*, it was determined that this ſon took an eſtate tail; for this determination was pronounced, expreſsly, upon the ground that by the will, as explained by the ſchedule, the ſon took an eſtate for life by *implication*, and that eſtate attracted to him the benefit of the limitation to his heirs males: ſo that the Court aſſumed it to be a *fact*, that the *will* and *ſchedule* were in legal intendment, *ſeveral parts* of the SAME inſtrument, and that the words of one paper, might be called in aid of the conſtruction, and in order to the expoſition, of the words in the other paper.

So as the preceding eſtate is of freehold, it is immaterial, whether the ſame is for *life* or in *tail*, or for the life of the *party*, or the life of any other perſon, or for the *joint* or *ſeveral* lives of the party and ſome other perſon; or is *abſolute*, as for *life certainly*; or has a collateral determination as *during widowhood*; or, as hath been already noticed, ariſes by *expreſs* limitation, *implication* of law, or *reſulting uſe*: and though the eſtate is determinable

determinable on an event which may happen in the life time of the anceſtor (*y*); as to A. and B. for the *life of* C. remainder to the *right heirs* of A. or to a woman during her *widowhood* (*z*), remainder, after her deceaſe, to her heirs of her body; ſo that the particular eſtate of freehold limited to the anceſtor, may determine in his life time, in the firſt inſtance by the death of C. and in the ſecond inſtance by the previous death or marriage of the widow, and conſequently, with a view to both theſe caſes, before there can be any one to fulfil the character of heirs, in relation to the tenant of the eſtate of freehold: *or* the anceſtor may, or *may not be living* at the time, that the limitation to the heirs, is, by the words introducing that limitation, to take place (*a*); as to two perſons who are not huſband and wife, during their *joint* lives, and, after the deceaſe of *either of them*, to the heirs of the body of the wife begotten by the huſband; ſo that the wife may die in the life time of her huſband, or ſurvive him, and, if ſhe ſurvives him, her eſtate of freehold will have determined in her life time: *or* the

(*y*) Fearne 33. Perk. § 337.

(*z*) *Merrel* and *Rumſey*, infra.

(*a*) *Merrel* and *Rumſey* 1 Keb. 188. Raym. 126. Siderf. 247. 4 Bac. Abr. 301.

anceſtor *muſt die*, before the object of the limitation to the heirs can be aſcertained, or, in other words, before it is certain, that he, in *particular*, is the perſon to whoſe heirs the limitation is made (*b*); as to A. and B. ſo long as they *jointly* together live, remainder to the right heirs of him *that dieth firſt*; ſo that the object of that limitation cannot be aſcertained till the death of one of the tenants for life, and as it is to the heirs of the perſon who ſhall *firſt die* that the ſecond limitation is made, that limitation cannot, by any poſſibility, give him a veſted intereſt in his life time; ſtill the rule applies; and the limitation to the heirs will give to the anceſtor the benefit imported by that limitation. The ſeveral examples introduced to illuſtrate the ſecond and third propoſitions, alſo, in ſome degree, illuſtrate the firſt. The third goes ſomewhat further, furniſhing the circumſtance that the anceſtor's eſtate of freehold muſt *neceſſarily* determine before the limitation to his heirs can give a veſted intereſt. On theſe examples alſo one obſervation more may be made: they all, except the laſt, immediately from the firſt inſtant, give *veſted intereſts*, and conſequently eſtates either in poſſeſſion or in remainder,

(*b*) Fearne 32. 33. 1 Inſt. 378.

remainder, to the anceſtor. The laſt example gives a contingent intereſt to the anceſtor.

Theſe poſitions will demonſtrate, with ſufficient accuracy, of what nature the eſtate of freehold muſt be, which, connected with a limitation to the heirs of the perſon who takes that eſtate, will attract to him the benefit of that limitation. They are all the examples afforded by caſes expreſsly determined on the point, and the principle of theſe determinations, in the terms they are ſtated, ſeems to ſupply authorities for every poſſible caſe that can be propoſed in reference to the natures and qualities of the anceſtor's eſtate of freehold.

For, according to one of our moſt celebrated law writers (*c*) (and under this *appellation* the name of Mr. *Fearne* will naturally occur) it may be conſidered as a general rule " That " whenſoever the anceſtor takes any eſtate of " freehold, whether it be, or be not, ſuch as may " determine in his life time, and there is after- " wards, in the ſame conveyance, an *unconditional* " limitation to his right heirs, or heirs in tail,

(*b*) Fearne 37.

" (either immediately, and without the interven-
" tion of any meſne eſtate of freehold, between
" his freehold and the ſubſequent limitation to
" his heirs; or mediately, that is with the inter-
" poſition of ſome ſuch meſne eſtate) there ſuch
" ſubſequent limitation to the heirs, or heirs in
" tail, veſts immediately in the anceſtor, and
" does not remain in contingency or abeyance;
" with the diſtinction that where ſuch ſub-
" ſequent limitation is immediate, it then be-
" comes executed in the anceſtor, forming, by
" its union with his particular freehold, one
" eſtate of inheritance in poſſeſſion; but where
" ſuch limitation is mediate, it is then a remain-
" der veſted in the anceſtor, who takes the free-
" hold, not to be executed in poſſeſſion, till the
" determination of the preceding meſne eſtates."
To the obſervation that the limitation to the heirs muſt be *unconditional*, and this, indeed, is a concluſion from the ſame principle, and perhaps (in general underſtanding, though not in ſtrict in technical propriety) within the ſcope of the ſame term, it muſt be added that this limitation muſt be to the heirs of ſome *certain* perſon, as of A. B. and not leave the anceſtor whoſe heirs are the deſigned objects of the limitation

tion unaſcertained; as to the heirs of the *ſurvivor* of ſeveral perſons; or to the heirs of *ſuch one* of ſeveral perſons as *ſhall firſt die*.—On this point ſome obſervations have been already made, and others will be ſubjoined.

And it is neceſſary to remark that though the limitation to the heirs may, originally, give a *contingent* intereſt, the intereſt imported by that limitation, may by the riſe of the event, or the lapſe of the time, that makes the eſtate contingent *veſt* in the anceſtor; and though the eſtate does not veſt in the anceſtor, and though it cannot by any *poſſibility* become a veſted intereſt in him, he will have the ſame as a *contingent* intereſt, which his heirs, if they ever become intitled, muſt derive from him by deſcent. And this intereſt will confer on its owner the power of *teſtamentary* alienation;—the *right* of *releaſing*, &c. The poſitions that have been advanced, will have led to the opinion, that the *quality* of the eſtate to paſs by the limitation to the *heirs*, with regard to its being veſted or contingent, cannot, in any caſe, depend merely on the nature or quality of the anceſtor's eſtate of freehold.

It muſt depend on ſome circumſtance or event independant of the determination of that eſtate; making it neceſſary that ſome act ſhall be done, time elapſe, or event take place, which is ſo far *unconnected* with the determination of the anceſtor's eſtate, that it *may not* happen during the continuance of that eſtate; nor in the inſtant in which it ſhall determine. All theſe obſervations take the application of the rule to be granted, and proceed upon a ſuppoſition of its application; and in thoſe inſtances alſo to which the rule does *not* apply, the limitation to the heirs, will, according to the circumſtance that their anceſtor is living or dead, give a *veſted* or *contingent* intereſt *to the perſons* who are the *immediate objects*, deſcribed by the terms of the limitation.

Alſo, though the eſtate of freehold is limited to *two* or more perſons *jointly*, or as *tenants in common*, the rule is admiſſible, whether under ſuch circumſtances, the limitation to the heirs, will give a joint intereſt, or ſeveral and diſtinct intereſts to the anceſtors, or to one of them ſingly, will depend on the terms of the limitation to the heirs, as will be noticed in the ſequel of theſe obſervations.

obſervations. Alſo though the freehold is limited to *one* perſon and the limitation is to the heirs or heirs of the body of that perſon and *another*, or of that perſon and *ſeveral others*, the anceſtor taking the eſtate of freehold, *may*, under this rule, have the inheritance to the extent of that part which is his ſhare, according to the number of perſons to whoſe heirs the limitation is made. On this point alſo ſome further remarks will be made. It muſt be obſerved too, in this place, that the ſeveral limitations to the anceſtor and his heirs muſt, *both*, give intereſts of the ſame nature, either both *legal*, or both *equitable*; and not one a *legal*, and the other *a truſt* eſtate (*c*); and as has already been noticed, with ſome doubt on this point, the anceſtor muſt not have the eſtate of freehold merely as a *truſtee*. Of equitable eſtates, and eſtates ariſing from deviſes in wills, as forming exceptions to the rule, ſome notice will be taken before the preſent ſubject is diſmiſſed.

The limitation to the heirs muſt be to them *generally*, or ſpecially; and the eſtate will be a fee

(*c*) Fearne 68. *Jones* v. *Say and Seale*, 8. Vin. 262. c. 19. *Tippen* v. *Cofin* Carth. 272. 4 Mod. 380. *Silveſter* v. *Wilſon*, 2 Term. Rep. K. B. 444.

fee or fee tail, and a fee, ſimple, determinable, or qualified, and a fee tail, general or ſpecial, according to the extent of the words of limitation to the heirs. Theſe heirs muſt in *deeds* be deſcribed by that, and in *wills* by the ſame, or ſome ſuch appropriated or ſubſtituted term, and as the *claſs* or denomination of perſons, who are the legal ſucceſſors of the anceſtor, in a regular courſe of deſcent, with a view to an eſtate in fee or fee tail to be derived from him (*d*). Theſe heirs, however, may be named to take, immediately after the death of the anceſtor, or after the determination of his eſtate, though that eſtate may determine in his *life time*; or after the determination of eſtates limited in remainder of his eſtate, and though the anceſtor's eſtate muſt determine before the limitation to his heirs can give a veſted intereſt; or at a time, that, with reference to the eſtate limited to the anceſtor, without any reference to other eſtates, may not happen ſo early as the period at which the anceſtor's eſtate will determine; or the limitation to his heirs may be made to depend for effect on a contingency, or to give a contingent intereſt from the uncertainty of the perſon deſcribed as their

(*d*) *Jones* and *Morgan*, ſupra.

their anceſtor. To a limitation to the heirs, to take effect by *ſpringing uſe*, the rule has no application. This is admitted (*e*), and ſeems to have great influence in deciding the effect of a limitation to a man in expreſs terms by one deed, and a limitation by another deed or inſtrument, to his heirs, under a power of appointment contained in the firſt deed. For what elſe than a ſpringing uſe, is a uſe to ariſe from power of appointment.

This caſe of the ſpringing uſe alſo ſeems to prove the poſition that the limitation to the heirs muſt be by way of *remainder (f)* remotely and in ſome degree at leaſt, if not immediately expectant on the anceſtor's eſtate of freehold: for upon what other poſſible ground can an objection be raiſed againſt the title of the anceſtor under the limitation to his *heirs?* And this is a much ſtronger caſe in favour of the rule, than that of ſeveral limitations ariſing from *different* inſtruments; though the limitation to the heirs is made in purſuance of a power of appointment to uſes, contained

(*e*) Fearne 414. *Lloyd* v. *Careyw* Prec. in Chan. 72. Show Par. Ca. 137.

(*f*) Fearne 416.

contained in another deed or inſtrument that *gives* the *anceſtor* an eſtate of *freehold.*

It has been propoſed that the limitation to the *heirs* muſt be to them as a *claſs* of perſons and the legal *ſucceſſors.*—By theſe poſitions it muſt not be underſtood that the *intention* of the parties neceſſarily muſt be that the heirs ſhall take by deſcent (*g*). On the line of diſtinction the neceſſary obſervations have been already made.—All that is required, to call the rule into operative force is, that the heirs are deſcribed to take in that character, and by that or, in wills, ſome ſuch ſubſtituted *name* (*h*); or, in the more pointed language of Mr. *Fearne* (*i*), "That the "limitation to the heirs, &c. is ſo calculated "and directed, that the perſon, claiming under "it, muſt intitle himſelf, merely under the *de-* "*ſcription* of *heirs*, of the ſpecies denoted, by "by the words in their *technical* ſenſe, and that "there is nothing, to reſtrain the ſame words, "from equally extending to, and comprehending "all other perſons, ſucceſſively anſwering the "ſame

(*g*) Harg. Tracts, 1 Vol. 562. 563.

(*h*) See ſupra. p.

(*i*) On Contingent Remainders, p. 313. and ſee 1 Harg. Tracts, 563. 575.

"ſame deſcription, or from intitling them alike "under it, and by that name only:" nor will it be any objection to the application of the rule, that it appears to be *probable*, nay even certain, that the heirs *as a claſs of perſons*, were intended to take originally, in their own right, and that the firſt eſtate, viz. the eſtate of freehold, was meant to be a mere eſtate for life, without any further intereſt, preſent or remote, in the anceſtor (*k*).

In many caſes, ariſing as well on *deeds* as in *wills*, this has been the *evident intention*, and yet it has not prevailed. In truth the object of the rule is to fruſtrate this intention, as often as the word heirs embraces all the perſons, *ſucceſſively anſwering that deſcription*, as the claſs of perſons deſcribed by that term; for when the author of ſeveral limitations, one to the anceſtor, the other to his heirs, or heirs of his body, means that the anceſtor ſhall take for his life only, and that every other perſon who, in ſucceſſion from generation to generation, ſhall be his heir, ſhall take as his heir, and yet that theſe heirs or ſome of them ſhall take in their own right, as purchaſers by that name, independant of their anceſtor, he then

(*k*) 1 Brown's, Ch. Ca. 220. *Thong* v. *Bedford*, ibid. 313.

then means what the law will not ſuffer *him* to give, or the heir to take as a purchaſer; for *all* perſons claiming under a deſcription or words of deſignation of *all poſſible heirs*, muſt take *as heirs* and not *as purchaſers (l)*. And ſo in other inſtances, though a reference has been made to the limitation to the *heirs*, as giving *contingent* intereſts (*m*) and making it proper to inſert a limitation to truſtees for ſupporting theſe intereſts, while in fact there were no intereſts of this quality, unleſs the limitation to the *heirs* was conſtrued to give the eſtate to them as purchaſers by that name; or words explanatory of the intention of a teſtator, and reſtrictive of the powers of alienation which may be exerciſed by tenant in tail, have been added *(n)*; or it has been declared in terms that the heirs were to take by *purchaſe (o)* or *ſeverally* and ſucceſſively by way of *remainder*; the rule has been applied *(p)*. Obſervations to this effect have been already urged;

(*l*) P. *Thurlow* in *Jones* and *Morgan*. 1 Brown. Ch. Ca. 220.

(*m*) Coulſon and Coulſon. 2 Str. 1125. *Ambroſe* and *Hodgſon*. ſupra. *Sayer* and *Maſterman*. Fearne 250. Ambl. 344.

(*n*) *Hayes* v. *Forde* 2 Black. Rep. 698.

(*o*) Lord Raym. 1 Harg. Tracts, 562.

(*p*) *Lawe* v. *Davis's*. 2 Lord Raym. 1561.

urged; and in proof of these positions, other cases will be introduced, in considering the exceptions to the rule.

And it may be assumed as a general position that it is more on the sense and *extent* in which the word heirs is used, than on any other circumstance in a a deed, will, or other instrument, that the construction of the several limitations must depend. The observations made on introducing the object of the rule, shewing its political tendency, must now again be called to recollection: and the reader is therefore referred to them. From these observations too it will be easily understood what is meant by a *class* or *denomination* of persons.

In those instances in which there are *superadded words* of limitation, taking notice of the *heirs* of the *heirs*, the influence of the words descriptive of the immediate heirs of the ancestor, must depend on the collective interpretation of the instrument.—Some observations will now be necessary to illustrate this point.

Though in deeds and wills, words of limitation are added to the gift to the heirs, yet if ſuch additional words are of the ſame import, or rather not at variance, with the former words of limitation, and are *virtually* included in and expreſſed by theſe words, the words of limitation, as uſed in the firſt inſtance, will, notwithſtanding the words of ſuperadded limitation, enlarge the eſtate of the anceſtor; veſting in him the intereſt imported by the limitation to his heirs. Thus in *Shelley's* Caſe (*q*), which is the identical caſe that gives denomination to this rule, a fine was levied by a man to the uſe of himſelf *for life*, remainder to the uſe of the *heirs male* of his body, lawfully begotten, and the *heirs males* of the body of ſuch heirs males lawfully begotten; and, in *Goodright* v. *Pullin* (*r*), a deviſe was made to N. for *his life*, remainder to the *heirs males* of the body of the ſaid N. lawfully to be begotten and *his* heirs for ever: with remainder over, if the ſaid N. ſhould happen to die without ſuch *heir male*; and, in both theſe inſtances, and in many ſimilar ones, it was held, that the ſuperadded words

(*q*) Supra. and ſee *Gulliver* and *Aſhby*. 1. Black. Rep. 607.

(*r*) 2 Lord Raym. 1437. Str. 729. See alſo *Morris* v. *Le Gay* cited 2 Burr. 1102. 2 Atk. 249.

words of limitation, being of the ſame import and extent as thoſe firſt introduced, and not inconſiſtent with the nature of the deſcent, to be purſued in conformity to the mention they made of the heirs, the word *heirs* in the ſuperadded clauſe of limitation ſhould be a word of limitation and not of purchaſe.

In this place it will be proper to remark that if the words engrafted on the limitation to the *heirs*, deſcribe an order of ſucceſſion, totally different from the one which muſt take place under the limitation to the *heirs* as originally named, and will not admit of the conſtruction, that by the heirs ſecondly named are meant the heirs in ſucceſſion of the heirs firſt named, as the heirs of the anceſtor, the words heirs, &c. in the firſt branch of the limitation, will be words of purchaſe. This exception is inſtanced by a gift to a man for life, remainder to his *heirs* and the heirs *females* of their bodies (*s*): alſo by a deviſe to A. for life, remainder to his *next heir* male, and the *heirs male* of the body *of ſuch next heir male* (*t*): and theſe caſes have very properly been allowed

(*s*) 1 Co. 95. b. 94. P. *Anderſon.*

(*t*) *Archer's* Ca. 1 Co. 66. b. See alſo *Luddington* and *Kime.*

to be exceptions to the rule, or rather not within its extent: for in the firſt of theſe inſtances, the *heirs*, deſcribed to be *inheritable as heirs* to the intail, were to be *females*; and in the ſecond inſtance, the *heirs* to take in ſucceſſion were to be thoſe heirs only which ſhould be the *iſſue* of the body of a *particular perſon*, deſcribed by the deſignation of *the next heir male* of the tenant for life; and the ſucceſſion, *as the inheritable quality of the eſtate*, was not, in the firſt caſe to be confined to, or to be conducted at all through males, nor in the ſecond caſe to be extended to *all* the *heirs* of the *body* of the tenant for life; and to have conſtrued the words "heirs" in the former caſe, and the words "*next heir male*" in the latter caſe to have been words of limitation would have given them this effect, in direct oppoſition to a contrary intention, clearly and manifeſtly expreſſed, and which ſhewed that *all* poſſible heirs were not to be intitled under the *firſt term* of deſcription.—At the ſame time it is obſervable from the adjudged caſes, that words of limitation that import a *fee* engrafted upon words which would give an *eſtate tail* (*u*); as to J. R. for *life*, remainder

(*u*) *Wright* v. *Pearſon*, Fearne 187. See alſo Dean ex dem *Webb* v. *Puckey*.

der to truſtees for his life, remainder to the uſe of the *heirs males* of the body of the ſaid J. R. and their *heirs*; and again words which of themſelves import a *general intail* engrafted upon words that would give an eſtate in *ſpecial tail* (*v*); as to R. M. and his *heirs male* of his body and their *iſſue*; and laſtly, in wills, words of clear and proper limitation, engrafted on words of the ſame extent and import and which have no determinate meaning, but, according to circumſtances, may be words of limitation or of purchaſe indiſcriminately; as to A. B. during his natural *life*, remainder to the *iſſue male* of his body lawfully begotten, and the *heirs male* of the body of ſuch iſſue male (*w*), will not prevent the attachment of the rule; for, in all theſe, and the like inſtances, the words of ſuperadded limitation are underſtood and conſtrued to be applicable to thoſe heirs *only* who are within the definite line of ſucceſſion, deſcribed by the firſt words of limitation.

The three inſtances laſt noticed aroſe upon limitations *in wills*. The ſame rules of conſtruc-

 tion,

(*v*) *Minſhul* v. *Minſhul*. 1 Tr. Atk. 411.

(*w*) *Dodſon* v. *Grew*, 2 Wills. 322.

tion, ſo far as relates to the words of ſuperadded limitation, allowing for the difference of words requiſite in deeds and wills, to limit eſtates, ſeem to apply to *deeds*; and perhaps it will not be too much to aſſume it as a general concluſion, deducible from the authorities which have been noticed, that the point of difference furniſhed by the caſes, is that if the ſuperadded words of limitation give a direction to the *courſe of deſcent*, different from that which muſt take place under the former branch of the clauſe of limitation, the words heirs &c. in that branch of the limitation, will be words of *purchaſe*, and not of limitation; but if the ſuperadded words are included within, and do not, in their extent, exceed the preceding words, but the words heirs, &c. in in the ſeveral parts of the limitation are in *terms*, or, at leaſt in conſtruction, of equal extent, the latter words are ſurpluſage, and the preceding ones, as connected with the limitation to the anceſtor, will be taken to be words of limitation.

Perhaps in the laſt of the adduced inſtances, the conſtruction was influenced more by the rules of interpretation extracted from the eſſay on eſtates, than by the rule treated of in this eſſay; ſince

ſince to have conſtrued the words iſſue male to be words of purchaſe would have defeated the general intention of the teſtator; either by giving the eſtate to a ſingle individual, to the excluſion of other perſons within the ſame deſcription, or by giving the eſtate to ſeveral perſons for their lives, with ſeveral inheritances, and thereby excluding the iſſue of each child from the aliquot parts of every other perſon beſides his own *parent*.

When the limitation to the anceſtor and the heirs are immediate, or eventually become ſo, by the determination or failure of intermediate eſtates, the ſeveral intereſts imported by theſe limitations, will conſolidate, and, by Merger, become one *intire* eſtate, giving one *undivided time* of *continuance*. When other eſtates are limited intermediately, the limitation to the heirs, will, during the exiſtence of theſe eſtates, give the anceſtor an eſtate in remainder, to take effect in poſſeſſion according to the order in which it is limited, in ſubordination to, and after the determination of, the intermediate eſtates by which it preceded, excepting only thoſe inſtances which are the ſame in principle or in circumſtances, as

the caſe of *Lewis Bowles* (*w*). In that caſe all the eſtates limited mediately between ſeveral limitations, one to a man and his wife for their lives, the other to their heirs of their bodies, were contingent; and it was held that an eſtate tail did execute in the huſband and wife, ſo as to intitle them to be deemed tenants of an eſtate tail in poſſeſſion: but *ſubmodo*: ſo that, upon the veſting of the contingent eſtates, the huſband and wife ſhould be tenants for their lives, with a *remote* remainder in tail.

When an eſtate of freehold is limited to an individual, and there is afterwards a limitation to the heirs or *heirs* of the body of that perſon and another, by the ſame clauſe and by copulative words (*x*); thus to A. for life, remainder to the *heirs* or heirs of the body of A. and B. (*y*); the limitation to the heirs will be conſtrued, as to one moiety to give the inheritance to the anceſtor who has the freehold; and as to the other moiety, to give a contingent remainder to the heirs of the perſon who has no eſtate of freehold; unleſs the ſeveral perſons in the caſe of a limitation to

(*w*) 11 Rep. 80. (*x*) 3 Leon. 4. 5 Rep. 8.

(*y*) 2 Rou. Abr. 417. pl. 6.

to the right heirs are huſband and wife; or in the caſe of a limitation to their heirs of their bodies are married or may lawfully intermarry (z); for then, in the former caſe the limitation will give the intereſt which it imports, to their heirs, being the iſſue of their bodies, originally in *fee*, and in the latter caſe, *quâcunque via data*, the heirs will be purchaſers of an eſtate tail, without any right in either of their anceſtors, ariſing from the limitation to their heirs.

But on the caſe of *Roe* and *Quartley* cited in the margin, it is to be obſerved, that neither of the anceſtors took any preceding eſtate of freehold. Conſidering this circumſtance, notwithſtanding the report of 3 Leon. 4. which is to the contrary to make no difference in the law to a limitation in theſe terms, ſo as only one of the parties, either the huſband or wife, takes an eſtate of freehold, the caſe of *Roe* v. *Quartley* is introduced as an authority to warrant the poſition as ſtated, and it is with ſatisfaction that the name and

(z) *Roe* v. *Quartley*. Fearne 44. 47. 85 1. Term. Rep. K. B. 630. 2 R. Ab. 417. H. pl. 1. 2. Dy. 99. 64. 1 Leon. 102. *Lane* and *Pannel* 1 Roll. Rep. 238. 317. 438. *Frogmorton* ex dem. *Robinſon* v. *Wharrey* 3 Wils. 125. 2 Bl. Rep. 728.

and poſitions of Mr. *Fearne* can be vouched in ſupport of the ſame hypotheſis (*a*). When the huſband and wife, or a man and woman who are about to intermarry, have an eſtate of freehold to themſelves *jointly* under theſe circumſtances, the limitation to their right heirs will give *them* the *inheritance* jointly (*b*). In the caſes cited as in point, to warrant the poſition ſo far as relates to the heirs of the bodies of two perſons who are huſband and wife—one of them had an eſtate of freehold, and it ſeems to make no difference in regard to a limitation to the heirs of the bodies of two perſons, one of whom only takes a preceding eſtate of freehold, whether theſe perſons are huſband and wife or not, ſo long as they may lawfully intermarry (*c*). When both theſe perſons take an eſtate of freehold, either together or ſucceſſively, that eſtate will intitle them *jointly* to the benefit of the limitation to their heirs of their bodies (*d*).

In

(*a*) Page 460.

(*b*) 2 Bl. Rep. 1211. Com. Digby Kyd. Eſtates, K. 1.

(*c*) 2 Roll. Abr. p. 417. H. pl. 1. 2. Dyer 99. 64. 1 Leon. 102.

(*d*) *Goſſage* and *Taylor*, Sty. Rep. 325. *Robinſon* v. *Wharrey* 3 Wils. 125. 144. 2 Black. Rep. 728. *Stephens* v *Bretridge*. 1 Lev. 36. Raym. 36. *Lane* v. *Pannel*, 1 Roll. Rep. 238. 527. 438.

In another caſe a man and a woman, *not his wife*, had an eſtate for their lives, with a remainder to the heirs of the bodies of the *woman* and her *huſband*; and it was determined that the *heirs* ſhould take by purchaſe *(d 2)*.

When the freehold is limited to *ſeveral* perſons *jointly*, and there is alſo a limitation to the heirs of the *ſurvivor* of them *(e)*, or otherwiſe, as to ſuch one of them as ſhall *firſt* die *(f)*, ſo as to leave the *certainty* of the perſon whoſe heirs are to be intitled under the limitation, to depend on the *lapſe* of time, or the riſe of an *event*, and though the eſtate to the anceſtor muſt ceaſe, as in the cited inſtance of a limitation to *two* for their *joint* lives, remainder to the *heirs* of the body of him who ſhall *firſt die*, before the objects of the limitation to the *heirs*, taking that word to refer to the legal ſucceſſors, can be aſcertained; or the limitation to the heirs is to give an eſtate upon a contingency; ſtill that limitation will give to the anceſtor the intereſt which it imports to convey. This intereſt, it is true, will, under theſe or ſimilar circumſtances, be contingent

(d 2) *Lane* and *Pannel*. 1 Roll Rep. 238. 317. 438.

(e) Fearne 39. *Highway* v. *Banner* and others. 1 Brown's Ch. Caſ. 584.

(f) Fearne 33. 1 Inſt. 378. b.

contingent. The rule however, attaches upon the ſeveral limitations, and the anceſtor will have the intereſt, and the ſame will be tranſmiſſible from him to his heirs, and be liable to be deſtroyed by his act; and the heirs cannot claim to be intitled otherwiſe than by *deſcent* from *him*. In thoſe caſes in which the freehold is limited to *two jointly*, and there is alſo a limitation to *their heirs*, the limitation to the heirs will give an intereſt to the anceſtors jointly (*g*). This is equally true in regard to limitations to heirs generally and to heirs ſpecial (*h*), unleſs the obſervation in reference to heirs ſpecial is applied to limitations to two or more perſons, who, either in regard to ſex, or relation ariſing from conſanguinity or affinity, may not lawfully intermarry, and the heirs of their bodies; for thus circumſtanced, the ſeveral anceſtors, though they have the eſtate of freehold jointly, will have ſeveral and diſtinct inheritances (*i*). When the anceſtors have ſeveral, ſucceſſive, and diſtinct eſtates for their lives, and the heirs to take under the ſecondary limitation, are

(*g*) Fearne 40. Inſt. 183. b. 184.

(*h*) *Roe* v. *Aiſtrop* 2 Black. Rep. 1228. *Denn* v. *Gillett* 2. Term. Rep. (K. B.) 431. Fearne 45.

(*i*) Fearne 41. 1 Inſt. 182. 184.

are to be of their bodies, the limitation to theſe heirs will give an eſtate of inheritance to the anceſtors jointly, or ſeverally, according to the circumſtance that they are, or are not, huſband and wife, or perſons who may lawfully intermarry (*k*). Thus huſband and wife, or perſons who may lawfully intermarry, will take the inheritance jointly, and perſons who are not already married, and may not lawfully intermarry, will have the inheritance ſeverally and diſtinctly.

If the anceſtors are huſband and wife, or perſons who may lawfully intermarry (*l*), the limitation to the heirs will give an intereſt to them jointly. If the anceſtors ſtand in a relation that they may not lawfully intermarry, each anceſtor will have a ſeveral and diſtinct eſtate of inheritance, unleſs they are huſband and wife *de facto*, though not *de jure*; and, being huſband and wife in this manner, they will, it is ſubmitted, have the inheritance jointly, or, more accurately ſpeaking, by intireties.

When

(*k*) Fearne 41. 43. *Stephens* v. *Bretridge* 1. Lev. 36. Raym. 36.

(*l*) Fearne 41.

When the limitation that names the heirs, is deſcriptive of the heirs of more perſons than take eſtates of freehold, then the obſervations already made on limitations of the freehold to one and to the heirs or heirs of the body of that perſon and of one or more perſons in addition to him, will lead to the conſtruction of the limitation to the heirs.

In thoſe caſes that a grant or limitation is made to *two* jointly, and the heirs of *one* of them (*m*), the limitation to the heirs will give the intereſt to their anceſtor, either by way of immediate eſtate, ſo as to be connected with, and form part of, the eſtate of freehold, ſubject to the intereſt of the jointenant, or by way of remainder, according to the form of the limitation, and the circumſtance that it does, or does not connect the limitation to the heirs, with the limitation to the anceſtor; as to two jointly and the heirs or heirs &c. of one of them, or makes a diſtinction between the ſeveral limitations, and the times at which they are to confer a right

(*m*) Fearne 41. *Wiſcot's* Caſe, 2 Co. 61. *Wincheſter's* Caſe, 3. Co. 1. *Franklyn* v. *Clithero*, Salk. 568.

right to the poſſeſſion: as to two jointly, and from and after their *deceaſe* to the heirs of one of them (*m. b*).

This ſeems to be the law on the ſubject, yet the point that the limitation to the heirs will give a *remainder*, when it is diſtinct from the limitation to the *anceſtor* and another perſon *jointly*, is not ſufficiently clear, from the determined caſes, to be relied on as deciſively ſettled.

In *Owen's* (*n*) Caſe, the huſband and wife were ſeized, under limitations to them and the heirs of the body of the huſband, and the huſband alone ſuffered a common recovery with *ſingle* voucher; and, upon the ground, that his wife had a joint eſtate with him, and that there are no moieties between huſband and wife, it was held that the recovery did not bar the *iſſue* or *remaindermen*: and in the *Marquis of Winchester's* caſe (*o*), limitations were made to a man, and a woman not his wife, and the *heirs* of the body of the *man*, and a recovery he ſuffered with *ſingle* voucher of the intirety, was held to be good for one moiety. Now both theſe caſes were determined upon the ground

(*m b*) Litt. § 578. Perk. § 88.
(*n*) 3. Co. 5. Mo. 210. (*o*) 3 Co. 1.

ground that the man had not an eſtate tail in poſſeſſion; in the Caſe of *Owen* in any part of the lands; and in the Caſe of the Marquis of *Winchester* in any more than one moiety; and yet in the caſe of *King* and *Edwards* (*p*), it was held, under ſimilar circumſtances, that the eſtate tail was ſo far executed in poſſeſſion, that a *feoffment* by the tenant of that eſtate created a *diſcontinuance*.

It is advanced too by Mr. *Wooddeſon* (*q*), in a note to his *Vinerian Lectures*, that "If the particular eſtate be to A. and B. *jointly* for their "lives, remainder to the heirs of the body of B. "this will be an eſtate tail in B, executed in B. ſo "as to make the inheritance not grantable *diſtinct* from the particular eſtate of *freehold*, by "way of *remainder*, but on the other hand, not "to ſever the jointure, or entitle the wife of B. to "Dower." 1ſt Fearne, 41. 42. 4th Edit. is cited for theſe poſitions, and it muſt be acknowledged that ſuch concluſion is drawn by that very able writer, from ſeveral inſtances of limitations which he has introduced, and on which he has obſerved. It is alſo true that in one of theſe inſtances the limitations were to A. and

(*p*) Cro. Car. 320. (*q*) 2 Vol. 205.

and B. for their lives, and after their deaths to the heirs of B. as ſtated by Mr. Woodeſon. The other inſtances are, 1ſt. a limitation to huſband and wife and the heirs of the body of the huſband; 2dly. a limitation to two men, and the heirs of their two bodies, or to the heirs of the body of one of them; and in both theſe inſtanees, the ſeveral limitations were made by one connected clauſe. Whether it was to theſe inſtances alone, that Mr. *Fearne* intended to confine the obſervation, that the intereſt imported by the limitation to the *heirs*, was not grantable away from, or without the freehold, by way of *remainder*, is not clear.

In the paragraph immediately preceding (*r*) the one ſelected, that gentleman advancces theſe poſitions, "When there is a joint limitation of "the freehold to ſeveral, followed up by a joint "limitation of the inheritance in fee ſimple to "them; as an eſtate to A. and B. for their lives, "or in tail, and afterwards to their heirs, ſo that "both limitations are of the ſame quality, that is "both joint, it ſeems the fee veſts in them "jointly; and ſo if the limitation of the freehold

(*r*) Page 40.

" be to the Baron and Feme jointly, remainder " to the heirs of their bodies, it is an eſtate tail " executed in them, as they are capable of iſſue, " to whom ſuch joint inheritance can deſcend— " But if the limitation of the freehold, be not " to them jointly, but *ſucceſſively*; as to one for " life, remainder to the other for life, remainder " to the heirs of their bodies; there it ſeems the " ultimate limitation is not executed in poſſeſ- " ſion, but gives them a remainder in tail,"

The diſtinction, then, perhaps, turns on the point that the anceſtor has ſeveral and diſtinct eſtates, or one intire eſtate; making the difference to be, that when the anceſtors have a joint eſtate, the limitation to the heirs, even of one of them will connect and unite with the eſtate of that perſon; forming one intire *inſeparable intereſt*; and that when the eſtates to the tenants for life are ſeveral and diſtinct, to take place ſucceſſively, the limitation to the heirs of one, or both of them, will give a *diſtinct intereſt* by way of *remainder*.

Without attempting to ſolve this point, ſince no certain concluſion can be drawn, it may be argued

argued, and, it ſhould ſeem, relied on, that when ſeveral *limitations* give *ſeveral* and *diſtinct* eſtates, the remote eſtates depending on preceding ones, muſt be remainders; and being diſtinct eſtates, and aſſuming this deſcription, there can be no objection to the transfer of ſuch intereſts, ſeparately from the eſtate of freehold, as *remainders*; and ſince the eſtate has the name, and all the qualities of a *remainder*, and (which is the eſſential point and diſtinguiſhing circumſtance) is diſtinct from the eſtate of freehold, what reaſon can be urged againſt its conferring the ſame privileges as are annexed to other eſtates of the ſame denomination?—It follows that the intereſt paſſing by the limitation to the heirs, is improperly called a remainder, or has all the qualities common to eſtates comprehended under, and embraced by that term of definition.

When the freehold is limited to two as *tenants in common*, and there is a limitation to the heirs of one of them, it is difficult to decide, whether the eſtate limited to the heirs will give, as to one moiety, an intereſt to the anceſtor; and, as to the other moiety, an intereſt to the heirs, by way

of contingent remainder; or as to both moieties, a contingent remainder to the heirs.

It ſeems moſt probable, indeed pretty clear, that the inheritance will be in contingency as to one moiety; and, as to the other moiety be veſted in intereſt. There is ſtill greater difficulty in determining on the conſtruction to be made on a limitation to two as tenants in common, with a diſtinct limitation to their heirs of their bodies. Perhaps it will again be neceſſary to recur to the diſtinction ariſing from the condition of the parties, that they are married, or may not lawfully intermarry. For it ſeems conſonant to the ſpirit of the law, diſcoverable from deciſions in other caſes, that in thoſe inſtances in which the perſons may not lawfully intermarry, the limitation to their heirs will give them the inheritance as tenants in common; and that this limitation will give them the inheritance jointly in thoſe inſtances that they are married or may lawfully intermarry.

To determine on the effect of a limitation to more than two perſons, of whom two or more may intermarry, or are actually married

married, for their lives with a remainder to their heirs of their bodies, is a taſk of too much difficuly to be undertaken.—On this ſubject ſome conjectures are offered in the chapter on eſtates tail, contained in the eſſay on eſtates,

The great object of the rule, as has been already noticed, is, from the limitation to the *heirs*, to raiſe an intereſt to the anceſtor. The circumſtance that the anceſtor takes an eſtate under the limitation to his heirs, renders that limitation of the ſame effect, as if it was made to him and his *heirs*, or his heirs of his body; inſomuch that the heirs cannot take as *purchaſers*, though, by reaſon of his death in the life-time of a teſtator, or for any other cauſe, the limitation of the eſtate of freehold ſhall be or become void as to *him*; for the limitation to his *heirs* will alſo be void. This was determined in the caſe of *Hodgſon* and *Ambroſe*, which has been ſo often mentioned. Nor does the rule interfere with the *quality* of the eſtate, to make it *veſted* or *contingent*, otherwiſe than by eſtabliſhing the point, that the intereſt cannot be contingent, merely from the circumſtance that the heirs of a particular perſon who is living, are, in terms, the object of the limitation.

It is too much however to concede the poſition inferred from *Brooke* (*s*) that the heir ſhall be in as heir, if by any poſſibility his father might have had the poſſeſſion; ſuppoſing that by this poſition it is to be underſtood that the limitation to the heirs will give a *veſted* intereſt in every caſe in which the anceſtor becomes intitled under that limitation. That poſition muſt be confined to the *manner* in which the heir is to claim, without any regard to the quality of the father's intereſt; and now ſince it is ſettled that the anceſtor will be intitled to the benefit to be derived under the limitation to his heirs, though it is *impoſſible* for that limitation to give a veſted intereſt in his life-time, the poſition cannot be cited to any purpoſe. So far from being law in point, to prove that the limitation to the heirs cannot give a contingent intereſt, in thoſe inſtances, that the anceſtor is to be intitled under that limitation, the contrary poſition is clearly eſtabliſhed. Grant that either from the uncertainty of a perſon, whoſe heirs are within the terms of the limitation; or of the event upon which this limitation is to have effect; or, probably, from the conſideration that the anceſtor's eſtate of freehold, may determine

(*s*) Fearne 36.

mine before the limitation to his heirs can poſſibly come into its place, in point of right to poſſeſſion, by reaſon of words which refer to ſome other time than his death, or the determination of his eſtate; as the death of B. the marriage of C. or of himſelf; making it neceſſary in order to the commencement of the eſtate paſſing under the limitation to the heirs, that ſome act ſhall be done, event take place, or time elapſe, which is in no wiſe connected with the determination of the preceding eſtate; or is connected with the determination of the preceding eſtate, only as the determination of that eſtate depends on a *contingent event*; the limitation to the heirs would paſs a contingent intereſt, in caſe that limitation was made to any individual, or deſcription of perſons; and the intereſt to paſs by the limitation to the heir's will, notwithſtanding the rule, for intitling the anceſtor, to the intereſt imported by that limitation, be contingent. On the other hand, notwithſtanding the anceſtor's eſtate of freehold may *determine* in his life time, and conſequently before any perſon can anſwer the deſcription of his heirs; as to A. during her *widowhood*, remainder after her *deceaſe* to her heirs; or to huſband and wife for their *joint* lives, and after the death

of *either* of them, to the *heirs* of the body of the wife by the huſband to be begotten; the intereſt imported by the limitation to the heirs, will not be contingent *merely* for that reaſon.

The laſt inſtance which is adduced, is taken from the caſe of *Merrel* and *Rumſey* (*t*), in which it was argued, that the remainder, depending on the eſtate to the huſband and wife for their joint lives, *being* limited to the heirs of *one of them*, ſo that it might be fruſtrated in caſe the wife ſhould ſurvive, and that it was therefore contingent, becauſe by the death of the huſband, the eſtate for life would determine, and the heirs of the body of the wife by the huſband, could not take, becauſe *nemo eſt hæres viventis*: and it is obſervable that this argument proceeded upon a ſuppoſition that the limitation to the heirs, (not from the terms in which it was introduced, for they provided for the death of the huſband in the life-time of the wife, by limiting the eſtate in remainder, to commence on the death either of the huſband *or* wife, but from the objects of the limitation, conſidered as *uncertain* perſons) gave an intereſt which could not take effect in poſſeſ-

ſion

(*t*) 4 Bac. Abr. 303. ſupra.

ſion, *till the* deceaſe of the wife, and that it muſt be contingent, becauſe the particular eſtate might determine before that event; but by the court, clearly, and with ſome diſpleaſure at the argument, the words *heirs* &c. are not words of *purchaſe*, but of *limitation* to the wife; and the eſtate veſts in her *preſently*, and is not in *contingency*; as if an eſtate be limited to a woman *durante viduitate*, remainder to her *heirs*, or the *heirs* of her body, this is a *fee ſimple* or *fee tail* executed in her preſently; and though ſhe afterwards *marries* yet that ſhall not deſtroy the eſtate that was veſted and well ſettled in her before, and here the remainder cloſes with the particular eſtate to all purpoſes, but dividing the jointenancy, and is no more than an eſtate to the huſband and wife, and the heirs of the body of the wife.

From the opinion then delivered in this caſe, it is a fair inference that the limitation to the heirs will give a veſted intereſt, in all thoſe caſes in which it will give an intereſt of this ſort, if limited to the anceſtor and his heirs. The ſpirit of the rule, and the deciſions thereon lead to this concluſion.

There

There are paſſages in *Fearne* (*u*) that ſeem to favour a contrary opinion. That opinion, however, reſpectable as it is, and fully as it might have been conſidered by the learned writer, cannot be oppoſed to the expreſs determination in *Merrel* and *Rumſey*; and in ſhort Mr. *Fearne* does not ſeem to advance it as a poſition, that the eſtate is *contingent*. All that he ſeems anxious to have eſtabliſhed, is that the limitation to the heirs, connected with an eſtate of freehold in their anceſtor, muſt, *at leaſt* give a *contingent* remainder to the anceſtor, and that the heirs can not be *purchaſers*, though it is poſible that the limitation to them may not, or although it is impoſſible it ever ſhould, even give a *veſted* intereſt to the anceſtor. And it is obſervable too, that Mr. Fearne (*v*) has ſaid in ſo many words the better concluſion ſeems to be, that the poſſibility of the freehold determining in the life of the anceſtor, does not keep the ſubſequentlimitation to his heirs from attaching in himſelf as a *veſted intereſt*. This paſſage then removes all doubt of his opinion.

The

(*u*) Page 33. 38. 39.

(*v*) Page 37.

The doctrine of the Rule extends to all *ſorts of inſtruments*, by which limitations of eſtate are made; and to limitations upon ſurrenders of *copyholds*; with ſome difference of conſtruction, in point of ſtrictneſs, according to the nature of the inſtrument, (as *deeds*, *wills* or *articles*) in which the limitations are made, and the object and tendency of the proviſions in theſe inſtruments and the nature of the intereſt which they confer; and, generally ſpeaking, and with the obſervation which has been made, that the ſeveral limitations muſt both give either *legal* or *equitable* intereſts, it extends as well to truſts that are executed, as to legal eſtates, excepting thoſe caſes of truſt which have circumſtances indicative of an intention contrary to and incompatible with, the effect that would attend the conſtruction that the heirs are to take by ſucceſſion in a courſe of deſcent. In theſe, and, in ſhort, all other caſes, the manifeſt intention precludes the application of the rule. In regard to truſts which are executory, and leave the *direction of a conveyance* to devolve on the Court of Chancery, by making it neceſſary that the truſtees ſhall act, and, of courſe, that this court ſhall interfere to ſee that act properly done, that court, which has exclusive

excluſive juriſdiction of intereſt of this ſort, will conſider the object of the parties, and, notwithſtanding the rule under conſideration, will decree limitations of eſtate, agreeable to the manifeſt intention; whether that intention is to be collected from the nature of the inſtrument; as *marriage articles*, and the perſons they generally have in contemplation, and for whom they intend at leaſt, if not profeſs, to provide, as the *children* of the marriage; or from expreſſions which clearly ſhew that the eſtate of the father is not to be enlarged by the limitation to his heirs, and that by the limitation to the heirs, *children* quatenus *children*, and *their iſſue*, and not hereditary ſucceſſors, as a collective claſs of perſons, are meant; the court *proceeding* upon the notion that the rule is controulable by arguments of intention, that, applied to legal eſtates, or *even truſts that are executed*, would be of no weight (*w*). Limitations in marriage articles are always conſidered, as raiſing *executory truſts*, unleſs the parties, *previous to their marriage*, carry theſe articles into execution by a *ſettelment* in fact. When ſuch ſettlement is made previous to the marriage, the articles are annulled, and no reſort can be had

(*w*) Fearne 71.

had to them: as it has been ſaid, upon the ground of a ſuppoſed *change of intention*, but, it is ſubmitted, rather for *want of juriſdiction*. To the general terms of theſe poſitions, there is an exception, ariſing from the fact, that it appears on the *face* of the ſettlement that the parties had the articles in their contemplation, and that the ſettlement was made in *purſuance* of, and with a view to perform the articles; and, under theſe circumſtances, the Court of Chancery will reſort to the articles, and decree an execution of them, by limitations in *ſtrict ſettlement*; conſtruing the words *heirs of the body*, to mean *firſt* and *other ſons* and *their heirs* &c. according to the uſual forms of ſettlements; and inſerting eſtates to truſtees to *ſupport* and *preſerve* the *contingent eſtates* of freehold; and by that means inſure effect to the intention of the parties.

That a truſt raiſed by *deed* not being *marriage articles*, or by a *will*, may be deemed *executory*, it muſt appear, by expreſs declaration, that the truſts are to *convey* &c. ſo that the Court of Chancery is intitled to interfere, and direct the mode in which the truſt ſhall be performed. This, indeed, is a ſubtle diſtinction; but it appears to be clearly eſtabliſhed (*x*). It

(*x*) *Glenorchy* v. *Boſville*. Ca. Temp. Talb. 3.

It will now be proper to conſider the exceptions to the rule. They naturally fall under an arrangement, that makes it moſt eligible to conſider them, as ariſing on limitations of the legal eſtate, limitations of *truſts* that are *executed*, and truſts that are *executory*.

In treating of the exceptions it will be material to advert, under each head of diviſion, to the difference of conſtruction of ſimilar limitations in *deeds* and *wills*, and to preſerve this diviſion, and diſtinct view of the ſubject.

To limitations of *legal eſtates made* by *deed*, this rule applies uniformly and invariably, with an exception of theſe inſtances only, in which the freehold is limited to one perſon, and the ſecond limitation is to the heirs of *that perſon* and *another* who are huſband and wife; or the heirs of the bodies of that perſon and another who are already married or may lawfully marry; ſo that the perſons deſcribed are to be the *common heirs* of their two bodies, not the reſpective heirs, or heirs of the body of each ſeveral perſon (*y*):—*or* words of *engrafted limitation* preſcribe an order of

(*y*) See Supra.

of ſucceſſion *totally different* from the one that muſt take place under the limitation to the heirs of the anceſtor; as in the example put by *Anderſon* of a gift to A. for life, remainder to his *heirs* and their *heirs females* of their bodies (*z*); the example as to *truſt* eſtates (which is underſtood to be alſo applicable in its *principle* to legal eſtates) afforded by the caſe of *Allgood* and *Wilbers* (*a*), in which, by declaration of truſt, equitable intereſts in lands were, by deed, limited to W. for life, remainder to the *heirs* of the body of the ſaid W. and of G. and M. and their heirs, executors, adminiſtrators and aſſigns: *or* the word heirs appears, by ſome expreſſion in the ſame deed, to be uſed as analogous to, and of the ſame import only with the word *ſon* or *child*; and this is clear from a *reference* to ſuch term of deſcription; as in *Archer's* Caſe already cited, the principle of which ſeems equally applicable to *deeds* and *wills*, and which caſe is alſo open to the obſervation that the ſuperadded words of limitation, confined the ſucceſſion to the *heirs* of the *next heir male* of the tenant for life and made that

(*z*) Supra.

(*a*) In Chan. in 1735. cited 2 Burr. 1107. 1 Vez. 150. 2 Atk. 582. 2 Vez. 648.

that heir the ſtock or anceſtor, and, conſequently preſcribed an order of ſucceſſion materially different from, becauſe far leſs comprehenſive than, the one which muſt have taken place, under the conſtruction, that the words "*next heir male &c.*" were words of limitation, and in *Walker* and *Snow* (*b*), which aroſe on a *fine* levied to the *uſe* of A. for life, remainder to the uſe of his *firſt* ſon, and of the heirs males of his body, with like limitations reſpectively to his 2d, 3d, 4th, 5th, and 6th ſons, remainder to the *right heirs of A. to be begotten* AFTER the *ſixth* ſon, and of his *heirs male*; and in *Liſle* v. *Gray* (*c*), which aroſe on a *covenant* by A. to ſtand ſeized, to the *uſe* of himſelf for *life*, remainder to the uſe of E. his ſon for life, remainder to the uſe of the *firſt* ſon of the body of E. and the heirs males of the body of ſuch firſt ſon, with like limitations to the 2d, 3d, and fourth ſons, by diſtinct clauſes, in tail male, with the following declaration, at the end of the limitation to the fourth ſon, "*And ſo ſeverally and* "*reſpectively to every of the* HEIRS MALES *of the* "*body of the ſaid E. and the* HEIRS MALES *of the* "*bodies of ſuch* HEIRS MALES, *according to their ages and*

(*b*) Palm. 359.

(*c*) 2 Lev. 223. Raym. 278.

"*and ſeniorities.*" And for default of ſuch iſſue then over; or from words of *explanation* as in *Lowe* v. *Davies* (*d*): in which caſe A. deviſed to B. and his heirs lawfully to be begotten, that is to ſay to his *firſt*, ſecond, third, and every *ſon* and *ſons ſucceſſively*, lawfully to be begotten of the body of the ſaid B. and the heirs of the body of ſuch firſt, ſecond, third and every other ſon and ſons ſucceſſively, lawfully iſſuing, as they ſhould be in *ſeniority of age* and *priority of birth* the eldeſt always and the heirs of his body, to be preferred before the youngeſt and the heirs of his body, remainder over: or the heirs are not to have the *inheritance* as in *White* and *Collins* (*e*), in which caſe the ſecondary limitation was to the *heir* for the term of his *natural life*, by words of expreſs and definite limitation that confined the eſtate of the heir to that exact and certain period, thereby giving him a particular eſtate in direct terms, and negativing the concluſion that the *heirs* were to have an eſtate of a deſcendible quality.

In the firſt of theſe caſes, ſince the heirs of the two perſons were not to take *diſtributively*, but

(*d*) 2 Lord Raym. 1561. (*e*) Comy. Rep. 289.

were to take jointly as anſwering the deſcription of one *common* heir, the anceſtor could not be intitled to all or any purparty of the lands, in reſpect of the limitation to the heirs. To have given him any purparty would have been to put different conſtructions on the ſame words, in application to the ſame ſubject matter, which equally allowed of that conſtruction, or excluded it in reſpect of every part; and to have given him the whole, would be to allow that the rule extends to thoſe inſtances, in which the heirs, who are named, are to be the heirs of the anceſtor and another perſon; and this is carrying the rule beyond its terms or its principle.

In the five following caſes, beginning with the one propoſed by *Anderſon*, the heirs took originally in their own right; and the engrafted words of limitation, deſcribed the order of ſucceſſion from them as the ſtock or firſt purchaſers; for in the firſt of theſe caſes the anceſtor would have taken an eſtate in fee, allowing that the limitation to him and his heirs gave the inheritance to him, while from the ſuperadded words of limitation, the intention of the parties was clear, to create an eſtate in tail *female*, to commence

mence in, and be deduced from, the *perſons* who ſhould be the *heirs* of the anceſtor. In the 2d. of theſe caſes it was clear, that the heirs of the bodies of W. G. and M. were *all* to take an inte- of the ſame ſort; and that the perſons who ſhould be the heirs of the body of G. and M. were to have a *fee*, was equally clear from the words of ſuperadded limitation, while to have conſtrued the limitation to the heirs of the body of W. to have given any intereſt to their anceſtor, would have been to create an intail in him, and to have put on theſe words a different import from what they bore in regard to the heirs of the body of R. and M. and to have rejected the ſuperadded words of limitation as having no meaning, ſo far as they related to the heirs of the body of W. In the third of theſe caſes the father of the next *heir male*, would have taken an eſtate in tail male, had the rule been applied to this caſe, while the words of limitation were to the *heirs* male of his next heir male, from which it was manifeſt, that the words *next* heir male were uſed in deſignation of a *particular* perſon, of the perſon in whom the deſcription of *heir male* ſhould be firſt fulfilled and that the words and *to his heirs* &c. were words of limitation,

aſcertaining the duration of the intereſt, or continuance of the eſtate he was to have, and which eſtate was not equally extenſive with the one that would have paſſed under the conſtruction, that the father of the next heir male had an eſtate tail; for an eſtate in tail male in him would have intitled all his ſons and their male iſſue to have been inheritable, while the words of the deviſee confined the eſtate to the next heir male and his heirs *males*, and, conſequently, excluded all the other ſons and their deſcendants. In the Fourth Caſe the words "*right heir*" and in the Fifth Caſe the words "*heirs males*," as appeared by the context, were clearly uſed in the ſame ſenſe, in the *firſt* of theſe two inſtances, as the *ſeventh ſon*, and in the *ſecond* of theſe inſtances *as every* OTHER *ſon after the fourth*, in ſucceſſion, according to the priority of his birth; and the ſuperadded words of limitation, engrafted on the words uſed in deſignation of the perſons, and as declaratory of the order of ſucceſſion, expreſſed the meaning of the parties, in a manner and in terms, that left no room for a doubt upon the intention; and in *White* and *Collins* the limitation to the heirs in expreſs terms, for *a definite* period of time, clearly demonſtrated an intention, that

that the *heir* ſhould take as a *purchaſer* in his own right, and for a *particular* eſtate; and ſince he was not to have the *inheritance*, the terms of the rule do not comprehend a caſe of this deſcription. This caſe alſo aroſe upon a deviſe in a will, but it is apprehended that a ſimilar caſe ariſing in a *deed*, is open to the ſame obſervations, and to be determined by the ſame rules of conſtruction, and that it is the particular circumſtance under which the limitation is penned, and not the nature of the inſtrument which precludes the application of the rule. Perhaps the gift by deed to a man *for life*, remainder to his *heir* in the *ſingular* number, with or without words of deſignation, and with words of ſuperadded limitation or procreation ſo as to create an intail, will form another exception; partly, indeed principally, upon the ground that the word *heir* in the *ſingular* number, cannot *in deeds*, be conſidered as deſcribing the whole claſs of legal and inheritable ſucceſſors. And it has been noticed and inſtanced by the Caſe of *Shelley*, that the rule applies, though to the words heirs males of the body, other words of limitation, ſeeming to import a claſs of perſons as their ſucceſſors, are added. The rule alſo applies, though, between the ſeve-

males of the body of every ſuch heir male, without any mention of ſons or children, or any other reference of the word heirs, beyond its legal and natural meaning, to perſons of this deſcription) ſhall take SEVERALLY and SUCCESSIVELY, as they ſhall be in PRIORITY OF BIRTH: every elder and the heirs male of his body to be preferred to every younger; will change the word *heirs* &c. into words of purchaſe (*l*); nor will the word *firſt next*, or *eldeſt*, ſubjoined to the word *heirs* in the *ſingular* number, or to the word *heirs* in the *plural* number, be ſufficient of itſelf, for this purpoſe, unleſs attended with words of engrafted limitation, clearly ſhewing that *particular perſons* were in the contemplation of the parties, and ſingly and individually the objects to be aſcertained under the deſcription of *heirs* of *their* anceſtors. Without ſuch ſpecial indication of intention, this word of reference will, in conſtruction of the words heirs &c. be underſtood to mean nothing more, than that the perſon, who, for the time being, ſhall be the *firſt* in the line of ſucceſſion,

(*l*) *Legate* v. *Sewell*, 1 P. W. 87. See alſo *Jones* and *Morgan*, 1 Brown's Ch. Ca. 206. 7 Brown's Par. Ca. 136. *Miller* v. *Seagrave*, Robinſons Gavelkind, 96. Fearne 280.

ſucceſſion, is the object to be preferred, and the perſon who is deſigned to take under theſe words.

Nor will words of ſuperadded limitation *always* make it neceſſary, to conſtrue the word heirs in the firſt inſtance, to be words of deſignation or purchaſe (*m*). That the word heirs may have this conſtruction, the words of ſuperadded limitation muſt vary, and be wholly inconſiſtent with, the line of ſucceſſion imported by the firſt mention of heirs, as in the ſeveral caſes already noticed, and therefore in *Wright* and *Pearſon* (*n*), a caſe which aroſe upon a deviſe, in truſt for A. for life, remainder to truſtees to ſupport contingent remainders, remainder to the uſe of the *heirs male*, of A. and their *heirs*) and in *Goodright* v. *Pullyn* (*o*), (a caſe which aroſe upon deviſe to N. for life, remainder to the *heirs male* of his body lawfully to be begotten, and his heirs for ever) it was held that the ſeveral deviſees took eſtates tail, under the limitation to *their heirs*; and, of courſe, the words heirs &c. were conſtrued to be words of limitation; and in the caſe

(*m*) Fearne 287.

(*n*) Ambl. 358.

(*o*) 2 Lord Raym. 1437. and *Minſhul* v. *Minſhul*, 1 Tr. Atk. 411.

caſe of *King* and *Burchell* (*p*) the deviſee was to I. H. for life, remainder, after his death, to the *iſſue male* of his body, and to *their heirs*; and for want of ſuch iſſue to W. R. his heirs and aſſigns for ever: and Lord Keeper *Henley* determined that I. H. took an eſtate tail, and that a proviſo for impoſing a charge on the eſtate, in favor of the perſon next in remainder, in caſe of alienation &c. by I. H. or his *iſſue male*, or (they, as well as the iſſue male, being named to take under limitations of other property) *iſſue female*, was void. The difference between theſe caſes, and others which, on a firſt impreſſion, appear to be ſimilar in their circumſtance, may, with a little attention, aſſiſted as that attention will be, by a reference to the principles and grounds of the ſeveral determinations, be eaſily diſcovered. On the reaſon which influences the determination of theſe caſes, notice has already been taken in different parts of this eſſay.

That the word *heirs*, in reference to limitations of legal eſtates, may be a word of purchaſe even in a will, it muſt, in terms, be explained to be of the ſame import with the word *children*, and uſed

(*p*) Ambl. 378. *Dodſon* v. *Grew*, 2 Wils 322.

uſed to deſcribe them, without extending to the whole line of ſucceſſors; as in the cited caſe of *Lowe* v. *Davies*, which was a deviſe "to B. and "his heirs lawfully to be begotten, that is to ſay, "to his *firſt*, ſecond, third, and every other *ſon* "*and ſons* ſucceſſively, lawfully to be begotten, of "the body of the ſaid B. and the *heirs* of the body "of ſuch firſt, ſecond, third, and every other ſon, "and ſons ſucceſſively lawfully iſſuing, as they "ſhould be in ſeniority of age, and priority of "birth; the eldeſt always, and the heirs of his "body, to be preferred before the youngeſt and "the heirs of his body;" or they muſt be uſed, and be interpreted, in this ſenſe, or otherwiſe can have no effect, according to the intention with which they are introduced in the will, "as to A. "and her heirs of her body, lawfully begotten, or "to be begotten as well *females* as *males* and *their* "*heirs and aſſigns* for ever, to be equally divided "between them, *as tenants in common*, and not as "jointenants (*q*)," or they muſt be uſed to deſcribe a *particular perſon*, either as an *individual*, ſelected out of the claſs of heirs, and in whom that deſcription is to be fulfilled, confining the eſtate in its extent

(*q*) *Doev. Lambe*, 2 Burr. 1100. 1 Black. Rep. 265.

extent to that individual, as in *White* and *Collins* (*r*), or enlarging his eſtate by giving an inheritable intereſt to be derived from him, as the anceſtor as in the caſe of *Archer* (*s*); in the former of which caſes the deviſee, as has already been ſtated, was to F. for his life, remainder to the heir male of his body lawfully begotten during *the term of his natural life*, and in the latter, the deviſe as has alſo been noticed, was to A. for *life*, remainder to the *next heirs male* of A. and to the *heirs* male of the body of ſuch next *heir male*; or the word muſt be uſed as aſcertaining a perſon already in exiſtence, giving an eſtate to him immediately; *as* to A. for life without impeachment of waſte, and, after the deceaſe of A. then to the heirs male of the body of A. *now living* (*t*) 'Tis true that one of the reaſons aſſigned by the Court for its determination of the laſt noticed caſe, was that the ſeveral limitations gave intereſts of different ſorts, one a legal the other a truſt eſtate; but it is alſo clear that the Court thought the caſe warranted a determination upon the grounds noticed in this eſſay.

In

(*r*) Supra. (*s*) Supra.

(*t*) *Burchett* v. *Durdant* Vent. 2 311. 2 Lev. 232.

In propoſing theſe inſtances of exception, the grounds on which they received the conſtruction affixed to them, and to which ſimilar caſes are intitled, is propoſed in a manner that ſuperſedes the neceſſity of any comment on each particular caſe: all therefore that remains to be done is to point to the circumſtances by which the caſe of *Lowe* v. *Davies* is to be diſtinguiſhed from *Legate* and *Sewell* and *Jones* and *Morgan*, ſince there is ſome degree of reſemblance between theſe caſes, though they ſtand as oppoſites furniſhing lines of diſtinction. In the caſe now introduced the teſtator explained the meaning that he impoſed on the word heirs, in the ſenſe he uſed them. He not only declared that he meant that they ſhould take ſeverally and ſucceſſively, according to the priority of their births; he in terms ſaid more; he directed that they ſhould take under the names of his *firſt* and other ſons, and not under the *general* and *collective* term of his heirs, and added a limitation to the heirs of thoſe perſons. For in this caſe the conſtruction did not depend on the technical ſenſe of the words heirs of the body, but on the particular ſenſe and meaning that the teſtator had annexed to them, and which he in ſo many words had declared

For in another caſe, ſubſequent in point of time, a deviſee was to one during the term of his natural life, and from and after his deceaſe, to the uſe of the *iſſue male of his body* lawfully begotten, and the heirs male of the body of ſuch iſſue male, and for want of ſuch iſſue male, remainder over (*x*), and it was determined in the Court of Common Pleas, that the anceſtor took an eſtate tail, and one judge ſaid, he thought too great regard had been paid to the words heirs male of the body of ſuch iſſue; ſo that the only poſſible difference between the two laſt cited caſes, that can make them diſtinguiſhable from each other, and be underſtood as contraſted authorities, is that in the former of theſe caſes, the word *only* was added to the limitation for life, and expreſſed an intention that the eſtate of the perſon, taking under that limitation, ſhould be confined to this exact period; and that in the latter of theſe caſes, there was no ſuch addition, nor the addition of any other word of declaration beyond the words of expreſs limitation.

Whether ſuch declaration ought to be deciſive, is ſubmitted to the reader. The writer of theſe

(*x*) *Dodſon* and *Grew*, 1 Wils. 322.

theſe obſervations cannot do leſs than ſay, he thinks that the queſtion, in caſes of this ſort, depends rather on the inquiry, whether the *heirs* are to have the inheritance, *quatenus* they are the *heirs*, and as a claſs of perſons, than whether it is the *intention*, that the *anceſtor* ſhall have an eſtate for *life*, and no eſtate of a greater *extent*.

Limitations of *truſts* which are *executed* (*y*), are, in deeds and wills, conſtrued by the ſame rules as ſimilar limitations of legal eſtates in ſimilar inſtruments, as often as this can be done, without manifeſt violation of the *expreſs* intention of the parties; and therefore, generally ſpeaking, limitations of truſts which are *executed*, whether contained in deeds or in wills, receive the ſame or a ſimilar determination, that, with a view to the different inſtruments, the ſame caſes would receive, if conſidered as giving legal inſtead of truſt eſtates (*z*). For the conſtruction on limitations of truſt eſtates, is to be the ſame as on limitations of legal eſtates, unleſs the intention of the author of the truſt is *apparently* and *clearly* different, and this is manifeſt, by plain and direct

 expreſſion,

(*y*) *Jones* and *Morgan*.

(*z*) *Bagſhaw* v. *Spenſer*, 2 Tr. Atk. 583

expreſſion, exhibiting circumſtances, or neceſſary implication affording concluſions, which preclude the conſtruction that would give the anceſtor an eſtate of *inheritance*, and point to the mode in which the heirs may take as individuals particularly deſcribed. The mere circumſtance that the anceſtor's eſtate is for the expreſs period of his life; to be diſpuniſhable of waſte; to be attended with a *power of leaſing*; that the life intereſt is to be a ſeparate eſtate; that truſtees are ſubſtituted, to ſupport *contingent* remainders; that, to the limitation to the heirs of the body, words of limitation to their heirs generally, are added; or that, in addition to the proviſions that the anceſtor ſhall take for life, that his eſtate ſhall be with impeachment of waſte, that truſtees, to whom an eſtate is deviſed for his life, ſhall ſupport *contingent remainders*, or without ſuch addition, theſe are words declaratory, that the heirs ſhall take *ſeverally, reſpectively, and in remainder, the one after the other as they ſhall be in ſeniority of age and priority of birth* (*a*); or that the heirs ſhall take by *purchaſe* (*b*), will not prevent the application of the rule; and, of courſe, the

(*a*) *Jones* and *Morgan* Supra.

(*b*) 2 Lord Raym. 1561.

the word heirs &c. will be a word of limitation and not of purchaſe. At the ſame time that theſe poſitions are advanced, it muſt be acknowledged that the caſe of *Bagſhaw* and *Spencer* (*c*), a caſe which aroſe on a will, if not over-ruled by the more modern determinations in *Wright* and *Pearſon* (*d*), *Auſten* and *Taylor*, and *Jones* and *Morgan* (*e*), is an authority, that the circumſtances that a proviſion is made, that the anceſtor ſhall not be puniſhable for waſte, and that an eſtate is deviſed to *truſtees* to ſupport *contingent* remainders, will, of themſelves, in the caſe of a truſt executed, change the words heirs &c. in a *limitation* to them, after a limitation to the anceſtor for life, into words of *purchaſe*, and make theſe words, in the conſtructive expoſition of a court of equity, exerciſing its controuling power of interpreting inſtruments by the preſumable intention of a teſtator, of the ſame import as limitations to *firſt* and *other Sons* &c. *ſucceſſively* in tail, in ſtrict ſettlement. In delivering his reaſons for this determination, Lord *Hardwicke* obſerved, that the great difference between the preſent caſe and

(*c*) Supra.

(*d*) Ambl. 358. Fearne 187.

(*e*) Ambl. 376. Supra.

that of *Coulſon* and *Coulſon (f)*, which was preſſed upon him as a deciſive authority for conſtruing the words heirs &c. to be words of *limitation* and not of *purchaſe*, was, that this was a deviſe of a *truſt* in equity, that of mere *legal* eſtate; the words of which muſt be taken as they ſtand, according to their ſtrict legal determination; that in the caſe of *Bagſhaw* and *Spenſer* then before the Court, all the limitations were the direction of a truſt which the Court was bound to carry into execution, according to the intention of the teſtator; and as to the difference urged to him between *truſts executed* and *executory*, he obſerved that the diſtinction had never been eſtabliſhed by any direct deciſion, for that all truſts, in notion of law, were *executory*, and to be carried into execution by the Court by *Subpœna*.

Since this caſe was determined, many caſes with ſimilar, and others with ſtronger circumſtances in favor of the heirs as *individuals*, have been the ſubjects of litigation in the Court of Chancery (*g*), and, in no caſe whatever, of a truſt executed, have the words heirs of the body, following a limitation

(*f*) 2 Str. 1125. 2. Tr. Atk. 246.

(*g*) *Wright* and *Pearſon*. *Jones* and *Morgan*, Supra.

limitation to the anceſtor for his life, been held to be words of purchaſe or received any other or a different determination, than the ſame caſe, conſidered as involving queſtions on limitations of legal eſtates, would have received.

And it is extremely difficult to ſhew what thoſe circumſtances are, which evince ſuch an intention, as makes it neceſſary to conſtrue the word heirs to be a word of purchaſe; otherwiſe than by referring to the caſes already introduced, as ariſing on queſtions reſpecting *legal eſtates*, and determined to have been exceptions to the general rule, that the word heirs is to be conſtrued a word of limitation.

The cited caſe of *Algood* and *Withers* (*b*) indeed ſeems an anamolous deciſion. It aroſe on a deed of conveyance to truſtees, of ſome lands in fee, and of other lands for the reſidue of a term, upon truſt for W. for life, remainder to the heirs of the body of the ſaid W. and of G. and M. and their heirs, executors and aſſigns; and it ſeems that the conſideration of the circumſtances, that the limitation to the heirs of W. was made to them,

(*b*) Supra.

and the heirs of G. and M. jointly, ſo that all the heirs of the ſeveral perſons were to take an intereſt of the ſame ſort, and that the heirs of the body of G. and M. were to take an eſtate in fee, as appeared by the words of ſuperadded limitation, and that the limitation to the heirs of the body of W. conſtrued as words of limitation, would have given an eſtate tail, ruled the determination of this caſe.

Truſts *executory* are peculiar to *marriage articles*, and thoſe inſtruments, whether deeds or wills, in which, by the expreſs proviſions of the inſtrument, the *truſtees* are to *convey*, *ſettle*, or *aſſure* the lands, on which the inſtrument is to operate, or to *purchaſe* land with money entruſted to be laid out in a real eſtate; thereby ſhewing that the parties have a further conveyance in their proſpect and contemplation. The mere circumſtance that the party covenants to do an act, or directs a conveyance to be made, will not, of itſelf, make the truſt executory. The concluclusion that a truſt is *executed* or *executory*, or that the limitations give *legal eſtates* muſt depend on the *quo animo*; on the previous queſtion, whether another inſtrument is in the contemplation of

of the party, as the act which is to give full and complete effect to the principal object he has in view, which is always underſtood to be the caſe in *marriage articles*, ſtipulating for a ſettlement to be made in future, and in deeds and wills, directing that lands which are to be purchaſed, ſhall be ſettled or conveyed, unleſs the ſettlement or conveyance is to be made to *uſes*, or upon *truſts*, the legal operation and effect of which are already fixed. That in a caſe thus circumſtanced, the truſt is not conſidered as *executory*, was decided in *Roe* v. *Aiſtrop* (*i*), and *Auſton* v. *Taylor*; particularly in the latter of theſe caſes; and that a truſt will not be executory merely becauſe the party covenants to *do an act*, is a diſtinction *clearly* deducible from all the caſes on this learning, and is particularly illuſtrated by an inſtance in fact, and a deciſion upon the queſtion, in *White* and *Thornborough* (*k*): and, indeed, the cited caſe of *Roe* and *Aiſtrop* is alſo an authority for the ſame concluſion. In *Roe* v. *Aiſtrop*, a ſettlement was made by the huſband previous to marriage, of his freehold eſtates, to the uſe of himſelf and his intended wife for their lives and the life of the ſurvivor,

(*i*) 2 Black. Rep. 1228.

(*k*) Ambl. 376. 2 Vern. 702.

vivor, and, after their deceaſe, to the heirs *of the body of the ſettler*, on the body of his intended wife to be begotten, with remainder to his own right heirs; and in that ſettlement, he *covenanted* to ſurrender his *copyhold*, which was of inheritance, deſcendible by the cuſtom of the manor to the youngeſt ſon, to the uſe of himſelf and his intended wife and their heirs of their two bodies to be begotten *in like manner*, and to the *ſame uſes* as the freehold lands therein before mentioned were ſettled and conveyed; and, after the marriage, he ſurrendered the copyhold, to the uſe of himſelf and wife for their lives and the life of the ſurvivor of them, and after their ſeveral deceaſes, to the uſe of the heirs of their two bodies, and for want of ſuch iſſue, to the uſe of himſelf in fee. *De Grey* Ch. I. ſaid it was a mighty clear caſe; and all the court agreed, that as the covenant for the ſurrender of the copyhold *referred to the uſes declared of the freehold*, the word heirs in the article, could not be conſidered as a word of purchaſe, but muſt have its legal effect, according to the effect of that word in the limitation of the freehold lands.

And

And in *Auſten* v. *Taylor* (*l*), a teſtator, after giving certain lands to truſtees and their heirs, among other truſts, upon truſt to P. for life, remainder to truſtees *to preſerve* &c. remainder to the heirs of the body of P. remainder to his own right heirs; gave the reſidue of his perſonal eſtate to truſtees, in truſt to buy lands in fee-ſimple; which he directed ſhould remain, continue, and be, to, for, and upon *ſuch* and the *like eſtate* and eſtates, truſts, intents, and purpoſes, and under and ſubject to the like charges, reſtrictions, and limitations, as were by him before deviſed, limited, and declared, of and concerning his *land* and premiſes therein before laſt deviſed, or as near thereto as might be, and the deaths of perſons would admit: and the Lord Keeper was of opinion, that in the caſe of *imperfect truſts* only, that Court could make a different conſtruction from a *legal* limitation. In that caſe, he ſaid, there was no *reference to the truſtees*; without that ingredient, he did not find any caſe where the Court had given a different meaning from what a Court of Law would on a legal limitation. Nothing was left to the truſtees to be done, but to buy the land. *The teſtator had declared the uſes of the land when purchaſed.* And

(*l*) Supra.

And in *White* and *Thornborough* (*m*), a man, with a view to his intended marriage, covenanted to levy a fine of freehold lands, and to ſurrender copyhold lands, to the uſe of himſelf for life remainder to his wife for life, remainder to his heirs males of his body by his wife, remainder to the heirs of their two bodies, and omitted to levy the *fine* or make the ſurrender; and Lord *Harcourt*, upon a rehearing, after a former hearing by him, in which he had conſidered the covenant as executory, the ſame as marriage articles, declared, that the covenant to levy the fine and declaring the uſes thereof, was to be conſidered, *not as articles* but as a *defective ſettlement*, and, in that Court (the Chancery) to be of the ſame effect, as if the fine had been levied, and the ſurrender made; and that the uſes were to be conſtrued as in a perfect and complete ſettlement, and not to be varied or altered.

In conſtruing marriage articles, and ſuch other inſtruments as are *directory*, particularly deeds or wills, providing for a conveyance to be made (*n*), or

(*m*) Supra.

(*n*) *Trevor* v. *Trevor* 1 Eq. Abr. 387. 2 Brown's Par. Ca. 122. *Streatfield* v. *Streatfield*. Ca. Temp. Talb. 176. *Cuſack* v. *Cuſack*. 1 Brown's Par. Ca. 129. *Nandick* v *Wilkes*. 1 Eq. Abr. 393. c. 5. Gilb. Eq. Rep. 114.

or ordering money to be laid out in the purchaſe of lands (*o*), the *end* and *conſideration* of the articles or other inſtruments, and the intent of the truſts are to be regarded; and in articles, *not followed up by a ſettlement made previous to the marriage*, or though there is ſuch previous ſettlement, the ſame purports to be made in *purſuance* and *performance* of the *articles*, the limitation to the heirs will not be the ſubject of this rule, if the application of the rule will give the anceſtor an eſtate tail, and enable him *ſolely*, by himſelf, to alien the inheritance to the prejudice of his children (*p*); for, in marriage articles, the unborn children are conſidered as purchaſers for a valuable conſideration, and the *very* objects of the intended ſettlement; and ſince a ſettlement that leaves the eſtate wholly in the power of the *ſettling parent*, would be nugatory, the Court of Chancery, merely *from the nature of the proviſion* (*q*), conſtrues the words of limitation to the *heirs of the body*, to mean the *children* of the marriage and their heirs (*r*); ordering the limitations in the ſettlement

(*o*) *Jones* v. *Laughton*, 1 Eq. Abr. 392.

(*p*) *Honor* v. *Honor* 2 Vern. 658. 1 P. W. 125. *Weſt* v. *Eriſſey* 2 P. W. 349. 3 Brown's Par. Ca. 327.

(*q*) *Streatfield* v. *Streatfield*, Supra.

(*r*) *Roberts* v. *Kingſley*, 1 Vez. 238.

ſettlement to be to the *firſt* and other *ſons* in tail, with remainder to the daughters as tenants in common in tail, with croſs remainders among themſelves in tail; and interpoſing eſtates to truſtees to ſupport contingent remainders; or ordering the limitations to be leſs comprehenſive, according to the extent of the words, deſcriptive of the heirs.

Articles carried into execution by a ſettlement made previous to the marriage without *any reference* by the *ſettlement* to the *articles*; and alſo thoſe limitations in articles, which are of that nature that the ſettling parent cannot dock the intail, without the concurrence of the other parent; and thoſe articles alſo, which, after making a proviſion for ſome iſſue of the marriage, as *ſons* by the name of *ſons*, giving them eſtates tail, and ſecuring portions to the daughters, contain limitations to the heirs; and thoſe articles alſo, which, by a *change of expreſſion*, in different claſſes of limitation, ſhew that the ſettling party makes a diſtinction between the uſes of the words *firſt* and other *ſons*, and the words *heirs of the body*, or even uſes the words heirs of the body differently, in different clauſes of the ſame inſtrument

ment; are not within the reaſon, nor objects of the exception.

For in thoſe inſtances in which the ſettlement is made *previous to the marriage*, without *any reference* to the articles, the ſettlement cannot be controuled by the *articles*; as ſome have thought, upon a preſumption of a charge of intention (*s*); but it ſeems rather upon the ground of want of juriſdiction in the Court of Chancery.

And it has always been thought a ſufficient and very prudent proviſion for the *iſſue*, at leaſt for the occaſions, of the *intended marriage*, that the limitations ſhall give *eſtates*, which, though they are of inheritance, do not confer a power of alienation, that can be exerciſed without the concurrence of the huſband *and* wife; ſo that neither the *huſband alone*, in the life-time of his wife, or *either* of them after the death of the other, can diſinherit the iſſue; and, upon this ground, as often as the limitations in their *legal import*, will intitle the anceſtors to intereſts or eſtates of this deſcription, the Court of Chancery has declined to interfere, or interfering, has allowed

(*s*) *Legg* v. *Goldwire*, Ca. Temp. Talb. 20.

allowed to the limitations, preciſely the ſame effect that they would have in a legal conveyance; and therefore in thoſe inſtances in which the tenor of the articles is, that the eſtate *of the intended huſband*, or an eſtate *by his proviſion* according to the ſtatute of 11 H. 7. (under which ſtatute he muſt convey the eſtate, or procure the ſame to be conveyed, or the ſame muſt be purchaſed with his money) ſhall be ſo ſettled, that the *wife alone*, ſhall have an eſtate tail; as to the uſe of the intended huſband for his life, remainder to his intended wife for her life, remainder to the *heirs of the body of the intended wife*, by her intended huſband; which was the form of the limitations in *Honor* and *Honor* (*t*) and *Whately* v. *Kemp* (*u*); or ſo that the *inheritance* ſhall be a *contingent intereſt* in each parent, and can never veſt in the parent to whom it is limited; as to the uſe of the huſband for life, remainder to the uſe of his intended wife for her life, and, after the deceaſes of them both, to the uſe of the *heirs* of *her* body by him, *if he ſurvived her*, and, if *ſhe ſurvived him*, to *his* heirs of his *body*, on her body to be begotten, remainder to his own right heirs; which was the Caſe of *Highway* and others v. *Banner*

(*t*) 1 P. W. 123. (*u*) 2 Vez. 658.

Banner and others (*v*); the Court of Chancery will not vary or alter the words of limitation, but will ſuffer them to be inſerted in the ſettlement, and have their full legal import and conſtruction.

The firſt of theſe three caſes aroſe on articles for a ſettlement, by the huſband, of freehold lands of which he was ſeized; the ſecond on articles for the ſettlement of freehold lands, to be purchaſed with his money; and the third on articles by a cuſtomary freeholder, to ſettle his cuſtomary tenant, held by copy of Court Roll; and the two firſt of theſe caſes clearly turned on the mere circumſtance, that the *wife alone* was to have an eſtate of inheritance in lands of the proviſion of the huſband, and therefore, it would not be in the power of the huſband alone, or of his wife in his life-time without his conſent, or after his death, without the conſent of the *heir in tail*, or of the perſon next in reverſion or *remainder*, to diſcontinue the eſtate tail, or make any alienation to the prejudice of her iſſue, the remainderman, or reverſioner; and the diſtinguiſhing circumſtance of the laſt of theſe three caſes, is, that the

(*v*) 1 Brown's Ch. Ca. 584.

the inheritance was limited, ſo that it could not *poſſibly* veſt in either of the parents while alive, but was neceſſarily to remain in contingency, as long as both the parents ſhould be living, and immediately after the death of *either of them*, and not before, was to veſt, and then veſt in the heirs of that perſon, as his deſcendants; ſo that *neither* of the parents would *ever* have a power of lawful alienation, though the limitation to the *heirs*, was to give the inheritance as a contingent intereſt, to *one* of them.

The concluſion from theſe three caſes is, that in the two former, the wife alone, to whom the inheritance was limited, and in the latter caſe, the huſband or wife, (to one or the other of whom the limitation was, upon the contingency that the perſon who was to have the inheritance ſhould *die* in the life-time of the other) had not, either of them, any *ſuch* eſtate, as would put it in the power of that perſon *ſingly* to make any alienation *by way of conveyance*, to the prejudice of the iſſue; and it is in caſes of this deſcription only, and in no others, that limitations to the heirs of the body, as providing for *all the iſſue* of the marriage, are, in articles for a ſettlement, conſtrued

conſtrued to intitle the anceſtor to the inheritance. For if the limitation in the articles to the heirs is in that form, that, according to the legal conſtruction of the words of limitation, *either* of the parents *ſingly* may, in the life-time, or after the deceaſe of the *other*, lawfully make any alienation to the prejudice of their children, the Court of Chancery will hold the words to be irregular, informal and uſed through miſtake, and order a ſtrict ſettlement to be made; and, therefore, as often as one of two perſons, who are about to intermarry, either the man or woman, articles to ſettle land on themſelves *jointly*, for a *joint* eſtate (*w*), or on themſelves *ſucceſſively*, for *ſeveral* and *diſtinct* eſtates (*x*); and by articles for a ſettlement by the *man*, there is to be a limitation to *his* heirs of his body (*y*), or the heirs of the body of himſelf and his intended wife (*z*); and by the articles for a ſettlement by the woman, there is a limitation to her heirs *of her body* to be begotten by her intended huſband (*a*), or to the

K heirs

(*w*) *Streatfield* v. *Streatfield*, Supra. *Jones* v. *Laughton*, 1 Eq. Abr. 392.

(*x*) *Trevor* and *Trevor*, Supra.

(*y*) *Streatfield* and *Streatfield*, and *Trevor* and *Trevor*, Supra.

(*z*) *Cuſack* and *Cuſack*, Supra. *Nandick* v. *Wilkes*, Supra.

(*a*) *Jones* v. *Laughton*, Supra.

heirs of the body of the intended huſband to be begotten by him on her body, or to the heirs of *their* two bodies (*b*), the limitations to the heirs will be conſtrued to have the firſt and other *ſons* in view, and the ſettlement will be ordered to be made accordingly; for ſince limitations to the heirs in this form will enable the intended huſband alone, in all the inſtances in which the limitations are to *his heirs* of his body, or the *heirs* of the *bodies* of himſelf and his wife, and after the death of the huſband, the intended wife *alone*, in all the inſtances in which the articles are for a ſettlement by her, the limitations are to *her* heirs of *her* body, or to *the heirs* of the bodies *of herſelf and her intended huſband*, to make an alienation to the prejudice of the iſſue, if the words are allowed the conſtruction they would receive *at law*, the Court of Chancery will interpoſe its power of correcting manifeſt miſtakes into which the parties have fallen, and direct the ſettlement to be prepared with thoſe forms of limitations, which will ſecure to the children &c. *certainly* and *effectually*, the proviſion evidently intended for them.

The

(*b*) *Burton* v. *Haſtings*, Gilb. Eq. Rep. 113. Fearne 154.

The diſtinction that a limitation to heirs &c. may, in articles, be conſtrued to give to the anceſtor, the intereſt imported by that limitation, when a proviſion is made for *all the children* of the marriage in ſome manner or other; for *ſome* by the names of *ſons*, for *others* under the appellation of *heirs*, is clear from the Caſe of *Powell* and *Price* (*c*), contraſted with that of *Weſt* and *Erriſſey* (*d*). In *Weſt* and *Erriſſey*, which was the firſt in order of time, the articles ſtipulated to *ſettle* lands, to the uſe of the intended huſband for life with waſte, remainder to the intended wife for life, remainder to the *heirs male* of the intended huſband, by his intended wife, remainder to the heirs male of the body of the intended huſband by any other wife, remainder to the *heirs female* of the intended huſband by his ſaid wife;—and leaſing and jointuring powers were reſerved to the intended huſband: and on an appeal to the houſe of lords againſt an order of diſmiſſion, made in the Court of Exchequer, it was decreed that the limitation to the *heirs females* intitled the *daughters* of the marriage to an *eſtate tail* by purchaſe; and the moſt probable

(*c*) 2 P. W. 535.

(*d*) 2 P. W. 349. 3 Brown. Par. Ca. 327.

grounds of this deciſion, are that the expreſſion heirs *females* contradiſtinguiſhed to heirs *males*, did, in marriage articles, call for the ſame conſtruction in favor of *daughters* that the expreſſion heirs *males* is, in theſe ſorts of inſtruments, allowed to have in favor of *ſons*; that both deſcriptions of perſons were, as far as any concluſion on that head could be drawn from the words of the articles, equally in the contemplation of the parties; and that no proviſion was made for the *daughters* beſides that which they could claim under the limitation to the heirs female of the intended marriage.

In *Powel* and *Price* the articles provided for a ſettlement, to be made to the uſe of the intended huſband for life, remainder to the uſe of truſtees for his life, to ſupport contingent remainders; remainder, as to part, to the uſe of the intended wife for her life, for her jointure, remainder, as to the whole, to the firſt and every other ſon of the marriage ſucceſſively, in tail male, remainder to the heirs male of the body of the huſband, under which limitation, as in *Weſt* and *Erriſſey*, ſons begotten by him on the body of any woman might have taken remainder to the heirs of his body

body by his intended wife, remainder to the right heirs of himſelf; with a power to huſband and wife to make leaſes; and a proviſion that if the huſband ſhould die without *iſſue male*, by his intended wife, and there ſhould be one *daughter*, ſhe ſhould have £3000. and if there ſhould be *more daughters than one*, they ſhould have £4000 among them: and theſe portions were ſecured on ſome part of the lands that were to be ſettled. And it was reſolved that £3000 ſecured to the daughter, the only iſſue of the firſt marriage, by a ſettlement which the huſband made on a ſubſequent marriage (he having, till that time, ſuffered the proviſion for the iſſue of the firſt marriage to reſt wholly on the articles) was an actual ſatisfaction of all demands under the articles, and that though a limitation by articles to the *heirs male* of a marriage, after an expreſs eſtate for life to the father, was taken to mean a remainder to the *firſt* and every other *ſon*, it did not follow that a limitation to the heirs of the body, muſt be equivalent to a remainder limited to daughters; eſpecially in this caſe, where they were poſtponed to the heirs male of the body of the intended huſband *by any wife*; and where there was an expreſs pecuniary proviſion made

for the daughrers by the firſt wife; to which may be added, and this circumſtance makes this caſe more clearly diſtinguiſhable from *Weſt* and *Erriſ-ſey*, where no notice was taken of *daughters* contraſted with *ſons*, or of *females* contraſted with *males*, as the expreſs objects of the proviſion made by the limitations of eſtates, and where care was taken of the daughters under that name, by a proviſion of a different ſort.

And that there is an allowed and eſtabliſhed diſtinction between thoſe articles which do, and thoſe which do not, by a change of expreſſion, in the ſeveral claſſes of limitation, ſhew that the ſettling party makes a difference between the uſe of the words *firſt* and *other* ſons, and the words heirs of the body, and even between the different uſe of the words heirs of the body in different clauſes of the ſame inſtrument, is clear from *Powell* and *Price* already cited, and from *Chambers* and *Chambers* (*e*), and *Howell* and *Howell* (*f*); particularly the two laſt mentioned caſes. In the former of theſe two caſes, money in the hands of truſtees, was articled to be diſpoſed of in the purchaſe

(*e*) Fitzgibbons 127. 2 Eq. Ca. Abr. 35. C. 4.

(*f*) 2 Vez. 358.

chaſe of lands, to be ſettled on the intended huſband for life, remainder to the intended wife for life, for her jointure, remainder to the *firſt* and *other* ſons of the marriage in tail male, ſucceſſively, chargeable with £2000 for younger children, remainder to the huſband in fee; and, by the ſame articles, the father of the intended huſband, covenanted to ſettle other lands on his ſaid ſon and the *heirs male of his body*, remainder to the right heirs of himſelf, the father:—And in the latter of theſe caſes, the articles were for a ſettlement of part of the land, on the huſband for life, remainder to the wife for life, remainder, after the death of the ſurvivor, to the heirs of the *body of the wife*; and of other part, on the huſband for life, remainder to the heirs of his body, remainder to the wife. And it was ſaid, in the firſt of theſe caſes, by Lord Chancellor *King*, that by the articles, thoſe lands which were comprized in the ſecond claſs of limitation were not intended to be ſettled, as a proviſion for the children of that marriage; that they were taken care of by the other part of the articles, by the truſt money; and that it was not like the common caſe of articles for a ſettlement on the iſſue of the marriage, where no *other proviſion* was made

for, or care taken of, them; and that the *different* manner of *penning* the articles in relation to the truſt money, and as to *thoſe lands*; the one to be in *ſtrict ſettlement* to the firſt and other ſons of that marriage, the other to be limited to the huſband and his heirs male of his body generally, and not tied up to the *iſſue of that marriage* (*b*), ſhewed plainly that the parties underſtood, and had in contemplation, the difference between a *ſtrict ſettlement* upon the *iſſue of that marriage*, and a *general ſettlement* upon the huſband and the heirs males of his body; and in the latter of theſe caſes, it was ſaid by Lord *Hardwicke*, that there was a *difference in the penning* of the two limitations; that on the *firſt*, the parties might have it in view, to leave it in the power, not of the father *only*, but of both to vary; that on the ſecond, there would be no ſenſe of the limitation, but as the ſon contended, which was to have the articles carried into execution ſtrictly, to the firſt and every other ſon in tail; that otherwiſe it would be in the power of the father, by fine, to bar it and defeat all the iſſue; that it ſeemed a ſtrong diſtinction on the face of the articles; and that there had been caſes adjudged on that diſtinction; that as there

(*b*) See infra.

there was a difference in the penning of the articles; in one (ſhould be, clauſe) of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a *reaſonable* way.

In delivering his opinion on this caſe, Lord *Hardwicke* cited a caſe of articles for a ſettlement, of part of certain lands on the father for life, the wife for life, the firſt and other *ſons* and *daughters* in tail; and of other part, on the father for life, and the *heirs male of his body* by his then intended wife; and ſtated Lord *Macclesfield* (who decreed to the father in tail, as to the lands comprized in the ſecond claſs of limitations) to have ſaid, by way of obſervation on that caſe, if that had been the ſole limitation, he ſhould, without ſcruple, decree in *ſtrict* ſettlement, according to the common rule; but that where the parties had ſhewn they knew the diſtinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the laſt limitation.

Deeds and wills which create truſts that are executory, and ſhew an intention in the party, that his directions ſhall not be conſidered as complete

complete, and concluſive, but rather as *minutes*, from which more full and more correct limitations are to be made, are open to the ſame obſervations, and intitled to the ſame conſtruction; and in theſe inſtruments the word heirs will receive the ſame interpretation, in articles, as often as there is any trace of an intention to uſe this word, or, in wills, and perhaps in deeds too, the word iſſue, or other ſubſtituted word of the ſame import, *as words of purchaſe*. In theſe inſtances, the clauſe for exempting the anceſtor from impeachment of *waſte*; the inſertion of truſtees to ſupport *contingent remainders*, or any like clauſe, furniſhes evidence of ſuch intention; and the caſe of *Leonard* v. *Earl* of *Suſſex* (*i*) goes ſtill farther; for in that caſe, the truſt was, by one, and the ſame connected clauſe, to ſettle upon the anceſtor *and his heirs of his body*, without any expreſs eſtate for life, or any other controuling circumſtances, beſides directions that ſpecial care ſhould be taken in ſuch ſettlement, that *it ſhould never be in the power of either of the ſons*, (who are the immediate objects of the deviſe) *to dock the intail of either of their moieties* (the deviſe being made to them of moieties) *during their or either*

(*i*) 2 Vern. 526.

either of their lives: on the other hand, according to the caſes of *Sweetapple* and *Bindon* (*k*), and *Legate* v. *Sewell* (*l*), a diſtinction ſeems to have been taken between *executory* truſts in *wills*, and in *articles* for ſettlements. In the former of theſe caſes, money was given to a daughter, to be laid out in land, and *ſettled* upon her and her children; and, if ſhe died without iſſue, then over; and in the latter caſe, the deviſe was for ſettling lands on "A. "for life, and after his deceaſe, to the *heirs male* of his body and the *heirs male* of the body of every "ſuch heir male, ſeverally and ſucceſſively, as they "ſhould be in priority of birth, and ſeniority of "age," remainder to B. and the rule propoſed in the firſt of theſe examples, was that in caſe of a *voluntary* deviſe, the court muſt take the deviſe as they found it, and not leſſen the eſtate or benefit of the legatee, although, upon the like words in marriage articles, it might be otherwiſe, when it appeared that the eſtate was intended to be preſerved for the iſſue; and in the latter caſe, that where ſettlements were agreed to be made upon valuable conſideration, the Court would aid *in artificial* words, and make an *artificial* ſettlement;

(*k*) 2 Vern. 536.

(*l*) 1 Eq. Abr. 395. 1 P. W. 187.

ment; and the Chancellor added, he never knew it done for a *bare volunteer*. However in *Glenorchy* v *Boſville* (*m*), Lord *Talbot* ſaid "The rule is "not generally true, that in *articles* and *executory* "*truſts* different conſtructions are to be admit-"ted." Still there ſeems to be this diſtinction, that in *wills*, though creating executory truſts, there muſt be ſome expreſſion, beſides the mere limitation to the anceſtor *for his life*, to enable the Court to diſcover, that the teſtator meant that the heirs ſhould not take in that right, and under the ſtrict technical import of that term; while in articles for a ſettlement, which would leave the iſſue of the marriage, who are the objects of the ſettlement, wholly in the power of the ſettling parents, if the ſettlement was made in the *words of the articles*, the articles will be held irregular, informal, and the iſſue conſidered as objects of the proviſion, and as purchaſers for a conſideration that extends to them: and the court will decree a *ſtrict* ſettlement, to ſecure to them the benefit of the proviſion, ſuppoſed by law to have been intended for them.

And

(*m*) Supra.

And from *Seal* and *Seal* (*n*) it is clear, that a direction that money ſhall be laid out in lands, and ſettled on one and his heirs males of his body, will not make the words deſcriptive of the heirs, to be a deſignation of *particular perſons*. In that caſe a teſtator directed, that all his money in the government funds, ſhould be laid out in a purchaſe of lands of 3 or £400 a year, and ſettled on his eldeſt ſon A. and the heirs male of his body, remainder to his ſecond ſon B. and the heirs male of his body &c. And though it was inſiſted that this, being the caſe of money directed to be laid out in land, was to be conſtrued like marriage articles, when lands are covenanted to be ſettled upon the huſband and the wife and the heirs male of the body of the huſband, in which caſe the Court would order a ſtrict ſettlement, viz. to the father for life, remainder to the firſt &c. ſons, to the intent the huſband might not bar it; and for the ſame reaſon ſhould do ſo here; the Lord Chancellor ſaid this caſe differed; for that in marriage articles, the children are conſidered as purchaſers: but in the caſe of a will, as this was, where the teſtator expreſſes his intent to give

(*n*) 1 P. W. 290. Prec. in Ch. 421.